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In The

Supreme Court of the United States

October Term, 1996

RUHRGAS AG,

Petitioner,

v.

MARATHON OIL COMPANY,
MARATHON INTERNATIONAL OIL COMPANY,
and MARATHON PETROLEUM NORGE A/S,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether under Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, an American group of wholly-owned affiliated companies may circumvent the obligation to arbitrate disputes arising out of an international commercial agreement containing a valid arbitration clause executed by one of the affiliates in the group by asserting claims on behalf of non-signatory affiliated companies, and thereby force a foreign contract party to defend itself in an American state court.

PARTIES

Petitioner is Ruhrgas AG. Petitioner was the defendant in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and was the Appellee and Cross-Appellant in the Fifth Circuit Court of Appeals.

Respondents are Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S. Respondents were plaintiffs in the underlying litigation and were the Appellants and Cross-Appellees in the Fifth Circuit. Respondents are referred to herein as "the Marathon Plaintiffs."

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioner Ruhrgas AG states that no single company owns more than fifty percent of the voting shares of Ruhrgas AG, but under a temporary contractual relationship, Bergemann GmbH may exercise 59.8 percent of the voting rights. Furthermore, Ruhrgas AG has no direct non-wholly owned subsidiaries in the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ruhrgas AG ("Ruhrgas"), subject to and without waiver of its challenge to the personal jurisdiction of the courts of Texas over Ruhrgas, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit dated June 10, 1997. The Fifth Circuit concluded that the claims asserted by the Marathon Plaintiffs against Ruhrgas were not subject to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("the New York Convention"), and that 9 U.S.C. §§ 203 and 205 (1994) therefore do not provide a basis for subject matter jurisdiction in the district court.[1] The Fifth Circuit vacated the judgment of the district court that had dismissed the claims against Ruhrgas for lack of personal jurisdiction, based on the Court of Appeals' determination that subject matter jurisdiction was lacking, and remanded the action to the district court with instructions that the action be remanded to the 152nd Judicial District Court of Harris County, Texas.

OPINIONS AND ORDERS DELIVERED BELOW

The opinion of the Fifth Circuit Court of Appeals, reported at 115 F.3d 315 (5th Cir. 1997), is reprinted as Appendix A hereto.

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[1] The Fifth Circuit also rejected two other grounds for subject matter jurisdiction which are not pertinent to the question raised by this Petition for Writ of Certiorari.

The order of the United States District Court for the Southern District of Texas granting Ruhrgas' Motion to Dismiss for lack of personal jurisdiction, denying Ruhrgas' Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, and denying the Plaintiffs' Motion to Remand and Ruhrgas' Motion to Dismiss on *forum non conveniens* grounds as moot (March 29, 1996) is not reported and is reprinted as Appendix B hereto.

The order of the United States District Court for the Southern District of Texas dismissing the action for lack of personal jurisdiction (March 29, 1996) is not reported and is reprinted as Appendix C hereto.

The memorandum and order of the United States District Court for the Southern District of Texas denying Ruhrgas' Motion for Stay Pending Arbitration (November 17, 1995) is not reported and is reprinted as Appendix D hereto.

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the June 10, 1997 decision of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C. § 1254(1) (1994).

TREATIES AND STATUTES INVOLVED

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, Article II(1) and (3):[2]

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

9 U.S.C. § 203 (1994):

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

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[2] The entire text of the New York Convention is reprinted as Appendix H hereto.

9 U.S.C. § 205 (1994):

> Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

STATEMENT OF THE CASE

This case arises out of an international commercial agreement involving the sale of natural gas produced from the Norwegian North Sea. The agreement, which is known as the Heimdal Gas Sales Agreement ("HGSA"), was negotiated in Europe and was executed by the parties in Norway in 1984. As the seller under the HGSA, Marathon Petroleum Company (Norway) ("MPN") has sold 70 percent of its share of the Heimdal Field gas production to a group of European companies, including Petitioner Ruhrgas. Inasmuch as MPN had and has no employees, the negotiation and execution of the HGSA and the performance thereunder was and is conducted by

personnel of Plaintiffs Marathon Oil Company ("MOC") and Marathon International Oil Company ("MIOC"), MPN's great grandparent and grandparent corporations, acting on behalf of MPN. The buyers purchase the gas from MPN for resale into the European market. The HGSA contains a Norwegian choice of law clause and a broad arbitration clause providing for arbitration in Stockholm, Sweden of "[a]ll claims, disputes and other matters arising out of or relating to" the HGSA under the arbitration rules of the International Chamber of Commerce.[3]

On July 6, 1995, MOC, MIOC, and Marathon Petroleum Norge A/S ("Norge"), MPN's sister corporation, filed this action against Ruhrgas in a Texas state court. In their lawsuit, the Marathon Plaintiffs allege that Ruhrgas made misrepresentations in Europe concerning the price to be paid to MPN for the gas, failed to pay a "promised premium price" to MPN, engaged in a conspiracy with Statoil, the 100 percent state-owned oil company of Norway, to monopolize the Western European gas market, and tortiously interfered with MPN's efforts to find another buyer for the gas in Europe. The alleged "promised premium price" was the price provided for in the pricing provisions incorporated into the original HGSA. Ruhrgas vehemently denies the allegations made by the Marathon Plaintiffs.

The foundation of all of the Marathon Plaintiffs' claims is the allegation that Ruhrgas failed to pay to MPN

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[3] See Articles 15 and 16 of the HGSA reprinted as Appendix E hereto.

the alleged "promised premium price" provided for in the original HGSA during periods after an amendment to the HGSA became effective.[4] Although these claims focus on an alleged failure to pay a sufficient price *to MPN*, MPN is not a plaintiff in this case. Instead, the Marathon group of companies used MOC, MIOC, and Norge to sue Ruhrgas in a Texas state court, in a transparent scheme to circumvent the HGSA's arbitration clause requiring arbitration in Sweden, and to force Ruhrgas to defend the claims in a distant, inconvenient, and unfamiliar forum.

Within 30 days of receiving notice of the lawsuit, Ruhrgas filed its notice of removal to the United States District Court for the Southern District of Texas. The removal was based, in part, on the arbitrability of this dispute under the New York Convention. The federal courts have original and removal subject matter jurisdiction of all disputes falling under the New York Convention. 9 U.S.C. §§ 203, 205 (1994). Ruhrgas then filed a Motion to Dismiss for lack of personal jurisdiction, and subject thereto, a Motion for Stay Pending Arbitration and a Motion to Dismiss on *forum non conveniens* grounds.

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[4] In 1990, MPN and Ruhrgas and the other buyers agreed to amend the HGSA to provide for a different price formula to become effective in 1992. The gist of the Marathon Plaintiffs' claims is that Ruhrgas and the other buyers should have continued to pay MPN for the gas based on the price formula contained in the original HGSA even after the new price formula in the 1990 amendment became effective in 1992. The Marathon Plaintiffs admitted in their Briefs in the Fifth Circuit that the alleged "promised premium price" is the price formula set forth in the original HGSA.

The Marathon Plaintiffs filed a Motion to Remand based on an alleged lack of subject matter jurisdiction.

On November 15, 1995, the district court denied Ruhrgas' Motion for Stay Pending Arbitration. Ruhrgas filed a Motion for Reconsideration of that Order.

On March 29, 1996, after the parties had completed jurisdictional discovery and briefing, the district court granted Ruhrgas' Motion to Dismiss for lack of personal jurisdiction, without reaching the subject matter jurisdiction issues raised by the Marathon Plaintiffs' Motion to Remand, and denied Ruhrgas' Motion for Reconsideration of the Order denying the Motion for Stay Pending Arbitration.

On appeal, the Fifth Circuit, without reaching the issue of personal jurisdiction, found subject matter jurisdiction lacking and vacated the judgment of the district court with instructions to that court to remand the case to state court. The Fifth Circuit specifically rejected Ruhrgas' contention that the Marathon Plaintiffs' claims were arbitrable under the New York Convention and that the district court therefore had subject matter jurisdiction under 9 U.S.C. §§ 203, 205 (1994).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's Decision Provides a Mechanism for an American Group of Affiliated Companies to Circumvent the Obligation to Arbitrate International Commercial Disputes and to Force Foreign Contract Parties to Litigate Disputes Falling Within the Scope of International Arbitration Agreements in a Distant, Inconvenient, and Unfamiliar Forum, in Contravention of the Strong Policies Favoring International Arbitration Underlying the New York Convention and this Court's Decisions in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

This case is important because the future of the New York Convention is at stake. The Fifth Circuit's decision undermines the firm and consistent policy repeatedly recognized by this Court since the United States' accession to the New York Convention which favors international commercial arbitration as a pillar supporting international commerce. If not reversed, that decision will have profound implications for the United States and the international economic system.

By acceding to the New York Convention, the United States has made a commitment to more than one hundred other countries that American courts will enforce arbitration clauses in international commercial agreements. The goal of the New York Convention is "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed . . . in signatory countries." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995)

(quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)). The New York Convention serves the vital interests of the signatory countries in promoting international trade because "[t]hrough the [New York] Convention, businessmen throughout the trading world can provide for prompt dispute settlement mechanisms that can function no matter what system of national law might encumber them domestically."[5]

In implementing the New York Convention, Congress amended Title 9 of the United States Code to provide that the federal courts have original and removal jurisdiction of all disputes falling under the New York Convention. 9 U.S.C. §§ 203, 205 (1994). These amendments are designed to ensure that the federal courts will oversee the United States' compliance with its obligations under the New York Convention. *McDermott International, Inc. v. Lloyd's Underwriters of London*, 944 F.2d 1199, 1207-13 (5th Cir. 1991).

Four years after the United States' accession to the New York Convention, this Court recognized the vital role that arbitration agreements play in international transactions. "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business

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[5] Gerald Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention On The Recognition and Enforcement of Foreign Arbitral Awards, 3 S.W.U.L. Rev. 1, 26 (1971).

transaction." *Scherk*, 417 U.S. at 516. This Court accordingly held that United States courts must enforce international arbitration agreements even if domestic United States law would prohibit arbitration. *Id.* at 519-20. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629-31 (1985), this Court reiterated the same important principles, stating that at least since the United States' accession to the New York Convention and Congress' implementation thereof by the amendments to Title 9, the federal policy favoring arbitration "applies with special force in the field of international commerce." *Id.* at 631. This Court most recently reaffirmed its commitment to the enforcement of international arbitration agreements in *M/V Sky Reefer*, noting that the benefits to the United States of international accords and its role as a "trusted partner in multilateral endeavors" require caution on the part of American courts in interpreting domestic law so as not to violate international agreements. 515 U.S. at 539.

The Fifth Circuit's decision in this case, if allowed to stand, will erode significantly the efficacy of this Court's decisions in *Scherk*, *Mitsubishi*, and *M/V Sky Reefer*. It validates a mechanism by which an American group of affiliated companies can circumvent arbitration of disputes arising under international commercial agreements by asserting claims on behalf of non-signatory affiliates in an American state court. The Fifth Circuit has eliminated the certainty of a neutral forum for resolving disputes arising out of international transactions that the New York Convention and this Court's decisions in *Scherk*, *Mitsubishi*, and *M/V Sky Reefer* guarantee.

The district court in this case expressly held (App. D at 4 n.1) that all of the claims which are the subject of this case arise out of or relate to the HGSA and therefore are within the scope of the broad arbitration clause contained in Article 15 of the HGSA (App. E). The Fifth Circuit did not disturb that determination. Indeed, that determination rationally could not be challenged, inasmuch as the claims are based on an alleged failure to pay the "promised" price for the North Sea gas purchased pursuant to the HGSA. Nevertheless, because the Marathon group of companies chose to initiate this suit using Marathon companies other than the Marathon company that contracted with Ruhrgas (MPN), the Fifth Circuit held that the arbitration clause in the HGSA did not prohibit the Marathon group of companies from haling Ruhrgas, a German company, into a Texas state court to defend its actions in connection with the purchase of North Sea gas under the HGSA.

It would be hard to envision a more blatantly transparent effort to eviscerate the obligation to arbitrate under an international arbitration agreement than that involved in this case. The Marathon Plaintiffs' own witnesses testified during jurisdictional discovery that in all dealings with Ruhrgas, Marathon personnel always were acting on behalf of the contracting Marathon entity, MPN. Inasmuch as MPN had no employees, employees of MOC and MIOC, acting on behalf of MPN, negotiated and executed the HGSA, including its arbitration clause. Personnel of MOC and MIOC, acting on behalf of MPN, controlled the prosecution of an arbitration successfully initiated by MPN against Ruhrgas and the other buyers in 1987, which was conducted in Sweden pursuant to the

HGSA. All of the dealings that are the subject of this case were dealings between MPN and Ruhrgas and the other European buyers under the HGSA. The corporate secretary of MOC and MIOC admitted that the only harm allegedly suffered by MOC and MIOC was an alleged reduction in dividends that purportedly would have flowed to those companies if Ruhrgas and the other buyers had not failed to pay a higher price to MPN for the gas sold under the HGSA.[6] In short, the Marathon group of companies is attempting to bypass MPN and its arbitral obligation, but at the same time assert MPN's claims based on alleged underpayments to MPN, claiming that the benefit of higher payments to MPN under the HGSA would have flowed through MPN to MIOC and ultimately, to MOC. The Marathon group of companies is engaged in a transparent contrivance to circumvent the obligation to arbitrate in the HGSA and to force Ruhrgas to defend itself in connection with matters under the HGSA in a distant, inconvenient, and unfamiliar forum.

The Fifth Circuit's decision in this case signals that United States courts will permit the American corporate parent or other affiliates of a company with an international agreement, which in hindsight is viewed as disadvantageous, to circumvent the arbitration clause incorporated into the agreement, and to initiate suit in the group's home forum either to obtain leverage in negotiations to alter the deal or to generate tactical litigation advantages to secure a different legal outcome. That is precisely what the Marathon group of companies is

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[6] See the Affidavit of John A. Evans reprinted as Appendix J hereto.

attempting. This Court condemned such procedural maneuvering to obtain tactical litigation advantages in *Scherk*. "A parochial refusal by the courts of one country to enforce an international arbitration agreement . . . would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." 417 U.S. at 516-17. This Court noted that such "jockeying" can "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517.

The prospect of this consequence flowing from the Fifth Circuit's decision in this case is neither theoretical nor hypothetical. In its Note Verbale to the United States Department of State concerning this case, the Federal Republic of Germany detailed the important role that arbitration agreements play in European transactions relating to natural gas.[7] The German government stated that "[i]f the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies not directly bound by these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of international legal and commercial relation would be gravely affected." *Id.* The Federal Republic of

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[7] Note Verbale No. 75/95 from the Federal Republic of Germany to the United States Department of State is reprinted as Appendix F hereto.

Germany characterized the actions of the Marathon companies as an effort to "circumvent" the arbitration clause in the HGSA. *Id.* A denial of certiorari in this case will be a clear signal that the American courts sanction such circumvention of international arbitration agreements by American companies. National courts in other countries may follow the United States' lead, so that American companies also will find themselves constrained to litigate in foreign courts notwithstanding a valid arbitration clause. Grave effects on the willingness of American and foreign businesses to engage in international transactions will result.

The Fifth Circuit ignored the policy issues underlying this Court's decisions in *Scherk* and *Mitsubishi*. In fact, the Fifth Circuit's opinion completely fails to mention either *Scherk* or *Mitsubishi*. Instead, the Fifth Circuit fashioned what amounts to a categorical "parties only" rule, justifying its decision forcing Ruhrgas to defend its actions under the HGSA in a Texas state court by focusing on the absence of any agreement between the Marathon Plaintiffs and Ruhrgas. The mechanical rule adopted by the Fifth Circuit makes it easy for American corporations that have chosen to become involved in an international transaction to drag their foreign contract parties into the state courts in the United States, despite the presence of a valid arbitration clause. Most substantial international transactions involve parties who are part of a group of companies that includes holding companies, operational companies, and project companies created for the purpose of carrying out specific activities and/or performing specific contracts. In these transactions, it is the project companies that enter into the agreements. The

Fifth Circuit's decision in this case provides a mechanism for these groups of companies to avoid arbitration clauses in international agreements. They have only to assert claims on behalf of the holding or operational companies and allege that those companies were to receive economic benefits from the transaction through the project company. As in this case, those economic benefits can be extremely remote and indirect. They flow through the project company to the holding or operational companies only as a result of intercompany transactions or investments which typically are not disclosed to the other contracting party.[8] When there is an arbitration clause, foreign and American companies engaged in international transactions are entitled to the certainty of knowing that claims arising out of those transactions will be resolved in the agreed upon neutral forum in accordance with the New York Convention, and that the courts will not permit a group of affiliated companies to circumvent the New York Convention by creative pleading.

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[8] The record before the district court revealed that none of Marathon's intercompany investments or loans were disclosed to Ruhrgas. The Fifth Circuit's decision effectively imposes on parties to international transactions a duty to inquire into and require disclosure of the corporate structure and intercompany transactions and investments within the other party's group of companies in order to identify those companies within the group which might later claim to benefit in some way from the transaction, and then insist that those companies join in the agreement to arbitrate disputes. The Court of Appeals' imposition of that duty ignores the realities of international commerce, in that intercompany investments and transactions are not a proper subject of inquiry in international transactions.

Neither domestic nor international legal principles require the mechanical "parties only" rule applied by the Fifth Circuit, which defeats the critical policies recognized in *Scherk* and *Mitsubishi*. The Courts of Appeals have held non-signatories bound to arbitrate under estoppel principles when the non-signatory knowingly exploits the agreement containing the arbitration clause and accepts benefits thereunder,[9] or when there is a close relationship between the non-signatory and a signatory and the claims are intimately founded in and intertwined with the underlying contract obligations.[10] However, the Fifth Circuit adopted an extremely narrow and technical approach to the application of estoppel principles, holding that they cannot apply in this case because the Marathon Plaintiffs' complaint contains no cause of action for breach of contract or for injunctive relief to enforce the HGSA. 115 F.3d at 321 & n.26. This approach ignores the substance of the claims[11] and encourages artful pleading to circumvent international arbitration agreements.

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[9] *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 778 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

[10] *J.J. Ryan & Sons, Inc. v. Rhone-Poulenc Textile, S.A.*, 863 F. 2d 315, 320-21 (4th Cir. 1988) (applying the New York Convention); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757-58 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994); *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984).

[11] The Fifth Circuit itself acknowledged that "the lost profits of MPN . . . may be relative [sic] in proving the extent of the plaintiffs' damages." 115 F.3d at 321 n.26.

Furthermore, the Fifth Circuit entirely ignored international principles applicable to "groups of companies." In international arbitration, a principle has developed under which the companies within a group may be bound by an arbitration clause executed by one of the companies of the group. For example, in *Dow Chem. v. Isover Saint Gobain*, Cour d' Appel Paris 21, October 1983, 110 J. 899 (1983) IX Yearbook 132 (1984) (English translation),[12] an International Chamber of Commerce panel of arbitrators concluded that the claims asserted by a parent and an affiliate of a signatory to an arbitration agreement were arbitrable, noting that "[t]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise." App. I at 11. The Paris Court of Appeals affirmed the decision of the arbitrators, specifically referring to the "group of companies" principle applied by the panel and noting that "the existence of [the principle] according to the customs of the international trade has not been seriously contested by the defendant." App. I at 2. In the Amicus Curiae Brief filed by the Federal Republic of Germany in the district court, Germany specifically acknowledges the

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[12] The English translation of the *Dow* decision as published in the Yearbook of Commercial Arbitration of The International Council for Commercial Arbitration is reprinted as Appendix I hereto.

validity of the doctrine and its applicability to this case.[13] The Fifth Circuit, however, failed to mention this issue in its opinion or to address the "group of companies" principles recognized in international trade. The Fifth Circuit's refusal to acknowledge even the possible application of international principles in determining the arbitrability of the claims in this case, in the words of this Court, "demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries." *Scherk*, 417 U.S. at 517 n.11.

The Fifth Circuit's opinion demonstrates the need for this Court to exercise its certiorari jurisdiction and provide guidance to the lower federal courts in carrying out their responsibility for overseeing the United States' compliance with its commitments under the New York Convention. Ruhrgas asks this Court to reject the Fifth Circuit's mechanical and formulaic approach and adopt a standard for determining the arbitrability of claims asserted by non-signatory affiliates arising from international transactions that recognizes the important comity concerns enunciated in *Scherk*, *Mitsubishi*, and *M/V Sky Reefer*, and the strong federal policy favoring international arbitration underlying the United States' accession to the New York Convention. If a court determines that the matters in dispute are within the scope of the arbitration clause and that the non-signatory affiliates are *arguably* bound under international "group of companies" principles or estoppel principles, all doubts concerning

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[13] The Amicus Curiae Brief filed by the Federal Republic of Germany in the district court is reprinted as Appendix G hereto.

arbitrability should be resolved in favor of arbitration, and the case should be held to fall under the New York Convention.[14] In the event the arbitration panel ultimately determines that it has no jurisdiction,[15] the dispute could return to the courts. In the event the panel confirms jurisdiction, the procedures for challenging that award before a national court are prescribed in Article V of the New York Convention. That orderly approach would serve the principles underlying this Court's decisions in *Scherk* and *Mitsubishi:* "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi*, 473 U.S. at 629 (citing *Scherk*).

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[14] *Compare Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Systems Co.*, 643 F.2d 863, 869 (1st Cir. 1985), in which then-Circuit Judge Breyer stated that "[o]nce it is determined that [the arbitration clause providing for ICC arbitration in Switzerland] *arguably* governs this dispute, then it is appropriate to remit the dispute for resolution in the Swiss arbitration." (emphasis in original)

[15] Ruhrgas accepts the propriety of arbitration of this dispute under the HGSA, and will not raise objections to the *locus standi* of the Marathon Plaintiffs before the arbitral panel.

CONCLUSION

Ruhrgas requests that this Court grant this petition for a writ of certiorari, reverse the decision of the Fifth Circuit holding that the claims asserted by the Marathon Plaintiffs are not arbitrable under the New York Convention and that subject matter jurisdiction is lacking under 9 U.S.C. §§ 203 and 205 (1994), and remand the case to the Fifth Circuit for further proceedings with instructions to consider the question whether the district court's dismissal for lack of personal jurisdiction was proper, and if not, to stay this action pending arbitration.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-20361

MARATHON OIL COMPANY; MARATHON INTERNATIONAL OIL COMPANY; MARATHON PETROLEUM NORGE A/S,

Plaintiffs-Appellants
Cross-Appellees,

versus

RUHRGAS, A.G.

Defendant-Appellee
Cross-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before POLITZ, Chief Judge, WIENER and STEWART, Circuit Judges.

POLITZ, Chief Judge:

This international commercial dispute involves allegations of fraud, civil conspiracy, and various business torts. Concluding that the district court lacked subject matter jurisdiction, we vacate and remand with instructions.

Background

In 1976 Marathon Oil Company (MOC) became involved in North Sea gas exploration activities when its affiliate, Marathon International Oil (MIO), purchased a European concern holding a North Sea production license.[1] The production license, originally held by Marathon Petroleum Norge (Norge), ultimately gave another affiliate, Marathon Petroleum Norway (MPN), rights to 24% of a gas field in the North Sea known as the Heimdal field.[2] Another large interest holder in the Heimdal field was Statoil, Norway's state-owned gas company, which had purchased a 40% interest in 1975.

The present litigation arises from alleged oral and written agreements between the Marathon companies, Ruhrgas, A.G., and other European companies regarding the development and production of Heimdal field reserves. Ruhrgas is Germany's primary gas company. According to the Marathon plaintiffs, Ruhrgas, Statoil, and a consortium of other European companies secretly conspired to monopolize the western European gas market by funneling a large portion of North Sea gas reserves through Ruhrgas's production facilities in Germany.

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[1] MIO acquired Pan Ocean and its subsidiary, Pan Ocean Norge, which held the North Sea production license. Pan Ocean was later renamed Marathon Petroleum Norway, and Pan Ocean Norge became Marathon Petroleum Norge.

[2] MPN acquired the production license by virtue of a Pass Through Agreement with its subsidiary, Marathon Petroleum Norge, the original license holder.

The plaintiffs allege that to effectuate this plan Ruhrgas duped them into providing MPN with $300 million to participate in extensive construction and drilling operations with the false promises of premium prices for MPN's European gas sales and guaranteed pipeline transportation tariffs to help offset the substantial construction investment.[3]

When it ultimately became apparent that premium prices would not be honored and the scheduled transportation tariffs would not materialize, MOC, MIO, and Norge[4] sued Ruhrgas in Texas state court for fraud, misrepresentation, civil conspiracy, and tortious interference with business relations. Ruhrgas timely removed, invoking jurisdiction under diversity of citizenship, federal question, and 9 U.S.C. § 205. After removal, Ruhrgas moved for a stay pending arbitration in Europe which the district court denied. Ruhrgas then failed a motion to dismiss for lack of personal jurisdiction and a motion to dismiss for *forum non conveniens*. The Marathon plaintiffs moved to remand for lack of subject matter jurisdiction. The district court granted Ruhrgas's motion to dismiss for lack of personal jurisdiction and dismissed all other

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[3] This proposal was known as the "Heimdal Gas Agreement," which allegedly guaranteed a $5.50 per million BTU price. MPN, as assignee of Norge's Heimdal license, was a party to this agreement.

[4] As a signatory to the Heimdal Gas Agreement, MPN's claims were subject to binding arbitration in Europe. Norge, however, was not a signatory and asserts that although it assigned its Heimdal license to MPN, it nonetheless has standing to sue for the alleged devaluation of the license. We address that contention *infra*.

motions as moot. The court then denied Ruhrgas's motion for reconsideration in which Ruhrgas reurged the court to abate all proceedings pending compelled arbitration in Europe. All parties timely appealed.

Analysis

We address at the threshold the vital question of federal subject matter jurisdiction. As courts of limited jurisdiction, federal courts may adjudicate a case or controversy only if there is both constitutional and statutory authority for federal jurisdiction.[5] Ruhrgas insists that we must rule on its personal jurisdiction challenge without first determining whether we have jurisdiction *ratione materiae*. We are cognizant that in some instances we have permitted the dismissal of an action for lack of personal jurisdiction without considering the question of subject matter jurisdiction.[6]

We decline, however, to extend those cases into mandatory rules of trial and appellate procedure governing the order in which jurisdictional motions must be determined. No dispositive precedent of our circuit has held

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[5] *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994); *B, Inc. v. Miller Brewing Co.*, 663 F.2d 545 (Former 5th Cir. 1981); Erwin Chemerinski, *Federal Jurisdiction* 217 (1989); *see also Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850) (Congress may create lower federal courts and thus has the power to vest them with less than full Article III jurisdiction).

[6] *See, e.g., Villar v. Crowley Maritime Corp.*, 990 F.2d 1489 (5th Cir. 1993); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d 559 (5th Cir. 1993); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964).

that a court *must* ignore a lack of subject matter jurisdiction when it has before it an easier disposition of a motion to dismiss for lack of personal jurisdiction. Such a rule necessarily would be invalid in light of our constitutional and statutory authority and the overwhelming body of precedent commanding all federal courts to scrutinize assiduously subject matter jurisdiction at each stage of litigation, trial and appellate, and to dismiss cases not properly before us.[7]

We must be ever mindful that any rule or decision allowing a federal court to act without subject matter jurisdiction conflicts irreconcilably with basic principles of federal court authority.[8] On several occasions we have sounded the caution that "[w]here a federal court proceeds in a matter without first establishing that the dispute is within the province of controversies assigned to it by the Constitution and statute, the federal tribunal

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[7] *See e.g., Cutler v. Rae*, 7 U.S. (7 How.) 729 (1849); *Mansfield v. Swan*, 111 U.S. 379 (1884); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Clark v. Paul Gray, Inc.*, 306 U.S. 583 (1939); *Philbrook v. Glodgett*, 421 U.S. 7078 (1975); *Judice v. Vail*, 430 U.S. 327 (1977); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100 (5th Cir. 1981); *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295 (5th Cir. 1985); *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427 (5th Cir. 1989); *Trizec Properties, Inc. v. United States Mineral Prods. Co.*, 974 F.2d 602 (5th Cir. 1992); *Moore v. United States Dept. of Agriculture ex rel. Farmers Home Admin.*, 55 F.3d 991 (5th Cir. 1995).

[8] *See, e.g., Kokkonen*, 511 U.S. at 377 (holding that the jurisdiction of the federal courts "is not to be expanded by judicial decree") (citing *American Fire & Cas. Co. v. Finn*, 431 U.S. 6 (1951)).

poaches upon the territory of a coordinate judicial system, and its decisions, opinions, and orders are of no effect."[9] If dismissals for lack of personal jurisdiction were judgments on the merits, decisions allowing that determination in the absence of federal subject matter jurisdiction would have no validity.[10] The appropriate course is to examine for subject matter jurisdiction constantly and, if it is found lacking, to remand to state court if appropriate, or otherwise dismiss.[11] Such a course respects the proper balance of federalism. We must, therefore, reject Ruhrgas's invitation to ignore the formidable subject matter jurisdiction issue presented herein and resolve that fundamental issue.

Given the limited nature of federal jurisdiction, there is a strong presumption against same,[12] and "the burden

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[9] *B, Inc.*, 663 F.2d at 548; *see also Stafford v. Mobile Oil Corp.*, 945 F.2d 803 (5th Cir. 1991); *Getty Oil Co. v. Insurance Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988); *In re Majestic Energy Corp.*, 835 F.2d 87 (5th Cir. 1988); *In re Carter*, 618 F.2d 1093 (5th Cir. 1980).

[10] *See Caterpillar, Inc. v. Lewis*, 117 S.Ct. 467 (1996) (holding that a district court must have subject matter jurisdiction by the time it renders judgment for the judgment to be valid); *see also Weeks v. Fidelity & Cas. Co.*, 218 F.2d 503, 504 (5th Cir. 1955) ("If the refusal to remand was erroneous, the judgment of dismissal was likewise erroneous.") (citing *Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd*, 292 U.S. 25 (1934)).

[11] Confronted with virtually identical facts, in *Ziegler v. Champion Mortgage Co.*, 913 F.2d 220 (5th Cir. 1990), we raised the subject matter jurisdiction question *sua sponte* and vacated the judgment of dismissal which was based on a lack of personal jurisdiction.

[12] *Cf. Leffal v. Dallas Indep. School Dist.*, 28 F.3d 521, 524 (5th Cir. 1994) ("Removal statutes are to be strictly construed against removal.").

of establishing the contrary rests upon the party asserting jurisdiction."[13] Ruhrgas, as the removing party, has advanced several theories in support of federal jurisdiction. We address each in turn.

A. Diversity of Citizenship

MOC is an Ohio corporation with its principal place of business in Houston, Texas. MIO is a Delaware corporation with its principal place of business in Houston, Texas. Norge is an alien corporation headquartered in Norway. The defendant, Ruhrgas, A.G., is an alien corporation headquartered in Germany.

Norge's status as an alien corporation defeats diversity jurisdiction,[14] unless, as Ruhrgas contends, Norge was fraudulently joined for that very purpose. Among other complaints,[15] Norge contends that Ruhrgas's

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[13] *Kokkonen*, 511 U.S. at 377; *see also Stafford v. Mobil Oil Corp.*, 945 F.2d 803, 804 (5th Cir. 1991) ("The burden of proving that complete diversity exists rests upon the party who seeks to invoke the court's diversity jurisdiction.").

[14] *See Giannakos*, 762 F.2d at 1298 (holding that "[d]iversity does not exist where aliens are on both sides of the litigation").

[15] At the time the parties filed their appellate briefs, Norge did not have the right to market Heimdal gas under the Pass Through Agreement. Briefing indicated that MPN's rights under the Pass Through Agreement would terminate if it failed to perform certain obligations. Norge predicted that such a reversion would occur as a result of Ruhrgas's activities during the summer of 1996. The current status of the Pass Through Agreement therefore is unclear. Terms in the agreement, however, indicate that Norge may have continuing obligations to the nation of Norway under the original production license

monopolization of the western European gas market completely prevents both MPN and itself from marketing Heimdal gas reserves to non-consortium buyers and thereby devalues the production license. Ruhrgas response that Norge cannot complain of any damage to its production license as Norge assigned all of its interests in the Heimdal license to MPN.

The party attempting to prove fraudulent joinder has a heavy burden.[16] To establish that a defendant has been joined fraudulently, "the removing party must show [by clear and convincing evidence] either that there is *no possibility* that the plaintiff would be able to establish a cause of action against the [nondiverse] defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts."[17] In making this determination, a court must resolve "all disputed questions of fact and all ambiguities in the controlling law in favor of the non-removing party."[18]

A close reading of the record and the extensive briefing on fraudulent joinder leave us unconvinced that Norge has been joined fraudulently to defeat diversity jurisdiction. It is not clear what interest Norge possessed

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and that Ruhrgas's interference in MPN's activities may be impacting those obligations. Norge also asserts that Ruhrgas has tortiously interfered with MPN's obligations to Norge under the Pass Through Agreement.

[16] *Ford v. Elsbury*, 32 F.3d 931 (5th Cir. 1994).

[17] *B, Inc.*, 663 F.2d at 549 (footnote omitted).

[18] *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir. 1992); *see also Burden v. General Dynamics Corp.*, 60 F.3d 213 (5th Cir. 1995); *B, Inc.*

when granted the production license, nor can we determine with certainty from the record and briefings what interest *vel non* Norge retains after the Pass Through Agreement. Although Norge maintains that it holds legal title to all unproduced reserves, it is apparent that several other possibilities exist for classifying Norge's property interest. Given Texas's choice of law rules Norwegian law likely would have to be consulted to answer these difficult questions.[19] At this stage in the proceedings, however, Ruhrgas shoulders the burden of proof, and it simply cannot prove, by clear and convincing evidence, that Norge has absolutely no possibility of recovering damages under any theory of liability. Diversity jurisdiction, therefore, is not present.

B. Federal Question Jurisdiction

Ruhrgas asserts that federal question jurisdiction is present because the "[p]laintiffs' claims raise substantial

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[19] *See Cantu v. Bennett*, 39 Tex. 304 (1873) (indicating that the law of the situs would control the characterization of Norge's property interests); *but see Swanson v. Schlumberger Tech. Corp.* (Tex. App. – Texarkana 1995, writ granted) (indicating that Texas law may control this determination under the "most significant relationship" test). Given the fraudulent joinder standards, we must presume that Norwegian law would apply. *Burden*. There is, however, no evidence of Norwegian law in the record. Even if we were to attempt to apply Texas law, classification of these various interests and the concomitant rights of Norge to pursue damage remedies would be unclear. This alone precludes a finding of fraudulent joinder. *See Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746 (5th Cir. 1996).

questions of foreign and international relations and questions of customary international law and act-of-state questions which are incorporated into and form a part of the federal common law." The Marathon plaintiffs note that they have alleged only state law causes of action and contend that the well-pleaded complaint rule bars a finding of federal question jurisdiction.

In *Torres v. Southern Peru Copper Corp.*,[20] we found federal question jurisdiction based on the federal common law of foreign relations. As in *Torres*, the defendant's government, the Republic of Germany, has filed a letter of protest with the State Department and an amicus brief with the court. The similarities between the two cases end there. Our holding in *Torres* is a very specific application of the well-pleaded complaint rule, under which the complaint must state a cause of action necessarily requiring the "resolution of a substantial question of federal law."[21] That test was met in *Torres* because the suit itself struck directly at vital economic interests of the nation, and, indeed, at the very sovereignty of the Republic of Peru.

The same cannot be said herein for the Republic of Germany. Its amicus brief focuses primarily on two areas: the enforceability and breadth of European arbitration clauses, and the impact on international trade from allowing suits against European companies to proceed in United States courts. Such concerns, though not insubstantial, would describe many international commercial

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[20] No. 96-40203, 1997 WL 259649 (5th Cir. May 19, 1997).

[21] *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

disputes between western European corporations and United States corporations and cannot properly form the basis of federal subject matter jurisdiction.

Ruhrgas appears to be an important gas supplier in Germany and western Europe but this action does not strike at the sovereignty of a foreign nation. The plaintiffs' claims do not call into question official German policy decisions and the Republic of Germany was not a participant in the activities giving rise to this suit. This litigation does not seek to impose liability for injuries to foreign citizens occurring solely on foreign soil, as was the situation in *Torres*. Indeed, Ruhrgas allegedly came to the United States and defrauded a United States company on American soil. Merely requiring a German corporation to abide by state law when present here does not *necessarily* implicate substantial foreign relations issues between the United States and Germany. Further, we remain unconvinced that this suit may impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany. Federal question jurisdiction does not exist.

C. 9 U.S.C. § 305

Finally, Ruhrgas claims that this case is removable under 9 U.S.C. § 205 because the plaintiffs' claims relate to an arbitration agreement falling under the Convention on the Recognition and Enforcement of Foreign Arbitral

Awards. Notably, MOC, MIO, and Norge were not signatories to any arbitration agreement, nor were they parties to any arbitration proceedings.[22]

Under 9 U.S.C. § 205, federal jurisdiction exists if the plaintiffs' claims relate to an arbitration agreement or award falling under the Convention on the Recognition of Foreign Arbitral Awards. An arbitration agreement or award falling under the Convention is one which arises out of an international commercial legal relationship.[23] No one disputes that the plaintiffs' claims arise from international commercial relationships; the issue is whether any *relevant* arbitration agreement exists between the parties to this litigation, a necessary predicate for federal jurisdiction under 9 U.S.C. § 205.[24] Simply stated, there is no such agreement.[25]

Ruhrgas maintains that the Marathon plaintiffs are attempting to enforce provisions of the Heimdal Gas Agreement, an agreement to which they are not parties. It further characterizes this suit as an inappropriate attempt

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[22] MPN, however, has participated successfully in arbitration proceedings in Europe.

[23] *See* 9 U.S.C. §§ 205, 2.

[24] *See Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Corp.*, 767 F.2d 1140 (5th Cir. 1995) (holding that the Convention only applies where (1) there is an agreement in writing to arbitrate the dispute; (2) the agreement provides for arbitration in the territory of a Convention signatory; (3) the agreement to arbitrate arises from a commercial legal relationship; and (4) a non-American citizen is a party to the agreement).

[25] Ruhrgas acknowledges that none of the Marathon plaintiffs have any contractual relationship with Ruhrgas and that none of the plaintiffs ever signed an arbitration agreement.

to circumvent the arbitration agreement under which MPN is bound to arbitrate any disputes concerning the Heimdal Gas Agreement. As such, Ruhrgas contends that the Marathon plaintiffs should be estopped from denying the applicability of the arbitration provisions. We are not persuaded.

MOC and MIO are not seeking redress for wrongs done to MPN. Rather, they allege that Ruhrgas and others jointly participated in a scheme to induce them fraudulently into investing $300 million into MPN. That Ruhrgas may have effectuated this fraud through its contractual relationship with MPN does not lead to the conclusion that MOC and MIO are seeking damages for harm done to MPN. Further, MOC and MIO are not seeking damages for any breach of contract; they could not do so because no contracts exist between them and Ruhrgas.[26] The same is true of Norge's claims. Norge merely claims that Ruhrgas's tortious conduct has affected the value of its production license and impeded its obligations and rights under the Heimdal license and Pass Through Agreement. Norge is not seeking damages on behalf of MPN, nor has it claimed entitlement to any rights under the Heimdal Gas Agreement.

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[26] Contrary to Ruhrgas's contention that the Marathon plaintiffs are seeking to enforce the pricing arrangements in the Heimdal Gas Agreement, plaintiffs do not seek injunctive relief. Moreover, the plaintiffs would not be entitled to recover the lost profits to MPN, though such figures may be relative in proving the extent of the plaintiffs' damages.

Finally, Ruhrgas asserts other theories for its thesis that the arbitration provisions in the Heimdal Gas Agreement should apply to all of MPN's corporate affiliates. None is persuasive.

Conclusion

Concluding that the district court lacked subject matter jurisdiction, we vacate the judgment of the district court and remand with instructions that this action be remanded to the 152nd Judicial District Court of Harris County, Texas.

VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, Plaintiffs,	§	CIVIL ACTION NO. H-95-4176
vs.	§	
RUHRGAS, A.G., Defendant.	§	

MEMORANDUM AND ORDER

Pending before the Court in the above styled case are:

(1) Ruhrgas, A.G.'s ("Ruhrgas") Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction;

(2) Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8);

(3) plaintiffs Marathon Oil Company ("Marathon"), Marathon International Oil Company ("MIOC"), and Marathon Petroleum Norge A/S's ("Norge") Motion to Remand (Instrument #12); and

(4) Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and

Defer Ruling Pending Discovery (Instrument #39).

The parties have performed discovery on these jurisdictional motions and have had the opportunity to fully brief the issues. Additionally, the Federal Republic of Germany has filed an Amicus Brief in Support of Ruhrgas (Instrument #58). Although the amicus brief at best only reasserts Ruhrgas's arguments, the plaintiffs have filed a response to the brief. After considering the parties' submissions, the record in the case, and the relevant law, the Court concludes that Ruhrgas's motion to reconsider the motion to compel arbitration should be denied, Ruhrgas's motion to dismiss for lack of personal jurisdiction should be granted, this case should be dismissed, and the plaintiffs' motion to remand and Ruhrgas's motion to dismiss for *forum non conveniens* should be denied as moot.

I. Factual Background

The basis of the case is the development of the natural gas, Heimdal Field ("the field"), located in the Norwegian North Sea. The plaintiffs' affiliate, Marathon Petroleum Company (Norway) ("MPCN") entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement, which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its actions with non-party Statoil, is liable to the plaintiffs

for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

II. Arbitration of Claims

It is undisputed that the agreement between MPCN and Ruhrgas contains an arbitration clause. The arbitration clause provides in pertinent part that:

> All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement . . . shall exclusively and finally be settled by arbitration in Stockholm, Sweden . . . .

Heimdal Gas Sales Agreement at article 15 (Instrument #1, Exhibit B, Exhibit 2 (filed under seal as Instrument #3)). With respect to the instant motion, the main dispute is whether the arbitration clause is binding on the plaintiffs, who admittedly did not sign the agreement.

Ruhrgas contends that this case should be stayed pending arbitration pursuant to sections 1 and 3 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) ("the Convention") and 9 U.S.C. §§ 3 and 208. The Fifth Circuit has held that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;

(2) does the agreement provide for arbitration in the territory of a Convention signatory;

(3) does the agreement to arbitrate arise out of a commercial legal relationship; and

(4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) (citing *Ledee v. Ceramiche Rauno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). The parties must concede that Sweden is a signatory to the Convention, the dispute arises out of a commercial legal relationship, and Ruhrgas is not an American citizen. The only requirement that is not clearly present is whether there is an agreement in writing to arbitrate the dispute.

Ruhrgas filed its initial Motion for Stay Pending Arbitration (Instrument #6) on August 28, 1995. On November 15, 1995, the Court issued an eleven page Memorandum and Order (Instrument #38) which denied Ruhrgas's motion for stay pending arbitration because it was not established that there was a written agreement whereby the plaintiffs had consented to arbitration with Ruhrgas. Soon after the denial of the motion for stay, Ruhrgas filed a Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39). In its motion to reconsider, Ruhrgas contends that the plaintiffs should be compelled to arbitration based on the virtual representation doctrine and on the "group of companies" doctrine which has been applied in France.

A. Virtual Representation Doctrine

Ruhrgas maintains that the Fifth Circuit's opinion in *Astron Indus. Assocs., Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968), requires that this case be stayed pending arbitration. In the Memorandum and Order denying Ruhrgas's initial motion for stay, the Court rejected Ruhrgas's virtual representation argument on the basis that the plaintiffs' claims against Ruhrgas are independent of any contract claims which MPCN might have against Ruhrgas. Instrument #38 at 8-10. The relationships between the companies involved in *Astron* are similar to those in the instant case. Transcontinental Industries, Inc. had a contractual relationship with Chrysler Motors Corporation to provide parts and supplies for Chrysler. Astron Industrial Associates, Inc. acquired Transcontinental relying in large part on Transcontinental's relationship with Chrysler. Astron felt Chrysler had breached the contract with Transcontinental and authorized its legal counsel to initiate two separate lawsuits against Chrysler on behalf of each company, Transcontinental and Astron. Transcontinental ended up in bankruptcy proceedings and eventually had its suit against Chrysler dismissed with prejudice. Chrysler then sought to have the suit by Astron dismissed on the basis of *res judicata*. On appeal, the Fifth Circuit concluded that the Transcontinental and Astron lawsuits were "identical for purposes of *res judicata*. In both suits the only wrong which Chrysler allegedly committed was its failure to supply automobile parts and supplies to Transcontinental." *Astron*, 405 F.2d at 962. "Whether the theory of recovery be misrepresentation to Transcontinental, misrepresentation to Astron, breach of contract with

Transcontinental, or breach of contract with Astron, the operative wrong remains the same, the evidence necessary to sustain the allegation is the same, and a different judgment in this suit would impair rights under the earlier dismissal." *Id.* Since the two lawsuits involved the same wrong by Chrysler and were being pursued by the two related companies, the Fifth Circuit determined that the dismissal of Transcontinental's suit barred Astron from pursuing its suit. *Id.*

Ruhrgas believes that *Astron* applies to the instant case because the plaintiffs' claims allege a wrong which is the same wrong which MPCN could assert against Ruhrgas in arbitration. The Court does not necessarily agree with Ruhrgas's belief that there is only "one wrong" allegedly committed by Ruhrgas. The claims that the plaintiffs have asserted are for alleged acts of misrepresentation by Ruhrgas that induced the plaintiffs to invest money in MPCN. The claims which MPCN could assert against Ruhrgas would deal with whether Ruhrgas breached the contract between them. Assuming, *arguendo* however, that Ruhrgas has committed only one wrong with respect to the plaintiffs and MPCN, Ruhrgas's argument regarding the virtual representation doctrine is that the plaintiffs have so much control over MPCN that the plaintiffs are in privity with MPCN under the virtual representation doctrine.

Ruhrgas has provided evidence which shows that in negotiations and dealings between MPCN and Ruhrgas, MPCN was represented by individuals who were also employees of the plaintiffs. Even if the Court agreed with Ruhrgas's argument that there is only one wrong and the plaintiffs and MPCN are in privity, Ruhrgas's case for

arbitration relies on a footnote in *In re Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989). In *In re Talbott*, the Fifth Circuit noted that whether a nonsignatory to an arbitration agreement could be compelled to arbitrate would be a closer question if the nonsignatory and signatory were in privity so that an arbitration award would have a preclusive effect against the nonsignatory. *Id.* at 614 n.4. However, *In re Talbott* involved a situation of whether a nonsignatory's action should be stayed pending the resolution of a related arbitration which might have a preclusive effect on the litigation. Thus, even *In re Talbott* does not necessarily apply in this case because MPCN has not initiated arbitration proceedings against Ruhrgas.

This situation may certainly be discouraging to Ruhrgas since the plaintiffs and MPCN might very likely have made a conscious decision that MPCN would not pursue any claims against Ruhrgas, but there would be nothing improper about the plaintiffs' [sic] doing so. The virtual representation doctrine has no application to this case and the plaintiffs are not bound by MPCN's arbitration clause on that basis.

B. Group of Companies Doctrine

Ruhrgas next argues that the plaintiffs should be bound by the arbitration clause to which MPCN agreed to based on the "group of companies" theory. This theory comes from *Dow Chemical v. Isover Saint Goban*, Cour d'Appel, Paris, 21 October 1983, 110 J. 899 (1983) TX Yearbook 131 (1984) (English translation) (a copy of the opinion is attached to Instrument #39 as Exhibit 1 to Exhibit A), an opinion by a French arbitration panel. In

Dow Chemical, two Dow subsidiaries had agreements with Isover which provided for arbitration. The issue resolved in *Dow Chemical* was whether the parent company, Dow Chemical (USA) and another subsidiary, Dow Chemical France, could also require that their claims against Isover be arbitrated as well. The French panel concluded that, in view of the major roles that Dow Chemical (USA) and Dow Chemical France played in executing the agreements with Isover, the arbitration agreement could be enforced by them. The panel stated that, "Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality . . . of which the arbitral tribunal should take account when it rules on its own jurisdiction. . . . " *Id.* at 136. Ruhrgas urges this Court to adopt the group of companies doctrine from *Dow Chemical* and hold that the plaintiffs in the instant case are bound by the arbitration clause executed by MPCN.

Obviously, the *Dow Chemical* opinion has no binding precedential value on this Court. Additionally, *Dow Chemical* does not squarely apply to this case. The French panel went on to state that, "Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and **in accordance with the mutual intention of all parties to the proceedings**, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise." *Id.* (emphasis added). In the instant case, although the plaintiffs may have played a

significant role in the negotiations of the contract between Ruhrgas and MPCN, it is certainly not clear that all the parties (the plaintiffs, MPCN, and Ruhrgas) intended to be bound by the arbitration clause between MPCN and Ruhrgas. Another important distinction between *Dow Chemical* and the instant case is that Dow Chemical (USA) and Dow Chemical France were trying to compel arbitration with a party which had agreed to arbitration with at least some related entity. In the instant case, however, Ruhrgas seeks to compel arbitration with the plaintiffs even though they have never consented to arbitration with Ruhrgas or any member of its group.

The Court declines to find that the plaintiffs should be compelled to arbitrate their claims with Ruhrgas based on the group of companies doctrine. Having rejected Ruhrgas's arguments in its motion for reconsideration of its motion for stay, the Court concludes that its denial of Ruhrgas's motion for stay pending arbitration was proper and the motion for reconsideration should be denied.

III. Discretion to Rule on Pending Jurisdictional Motions

In the Scheduling Conference held before United States Magistrate Judge Frances H. Stacy on November 6, 1995, each side of this case argued that the Court should rule on its respective jurisdictional motions without ruling on the motions of the other. In other words, the plaintiffs desired to have the Court grant their motion to remand without ruling on Ruhrgas's motions to dismiss. Ruhrgas, on the other hand, desired to have the Court

rule on the arbitration issue and/or the motions to dismiss for lack of personal jurisdiction and *forum non conveniens* before ruling on the motion to remand. At this point, the Court is faced with choosing first to rule on the plaintiffs' motion to remand, Ruhrgas's motion to dismiss for lack of personal jurisdiction, or Ruhrgas's motion to dismiss for *forum non conveniens*.

In the Fifth Circuit, the law is well settled that district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand. *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 690 (1994). Judicial economy is served by the exercise of this power because if the district court remands the case, it has merely avoided ruling on a motion that will fall to the state court to decide. *Id.* Furthermore, it is often necessary for district to address the issue of personal jurisdiction regardless of which motion it addresses first. *Id.* The Court will first discuss Ruhrgas's motion to dismiss for lack of personal jurisdiction because the conclusion that personal jurisdiction does not exist over Ruhrgas is dispositive of the remaining motions and the case.

IV. Motion to Dismiss for Lack of Personal Jurisdiction

Pursuant to Fed. R. Civ. P. 12(b)(2), Ruhrgas moves to have the claims against it dismissed. When a defendant challenges personal jurisdiction, the plaintiffs have the burden to prove that the Court has jurisdiction over the defendant. *Colwell Realty Invs., Inc. v. Triple T Inns of Arizona, Inc.*, 785 F.2d 1330, 1332 (5th Cir. 1986). The

plaintiffs must establish by *prima facie* evidence that personal jurisdiction exists over Ruhrgas. *Union Carbide Corp. v. UGI Corp.*, 731 F.2d 1186, 1189 (5th Cir. 1984). The Court may exercise personal jurisdiction over a non-resident defendant only if (1) the defendant is subject to service of process under the forum state's long-arm statute and (2) the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Colwell Realty*, 785 F.2d at 1333. Because the Texas long-arm statute, Tex. Civ. Prac. & Rem. Code § 17.042, "reaches as far as the federal constitutional requirements of due process will permit," the Court need only determine whether the exercise of personal jurisdiction over Ruhrgas satisfies the United States Constitution's due process requirements. *Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 200 (Tex. 1985).

The due process clause of the Fourteenth Amendment, as interpreted by the Supreme Court, permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has established "minimum contacts" with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts prong of the test may give rise to either "specific" or "general" jurisdiction. *WNS, Inc. v. Farrow*, 884 F.2d 200, 202 (5th Cir. 1989). When the act or transaction being sued upon is unrelated to the nonresident defendant's contacts with the forum state, personal jurisdiction does not exist unless the defendant has sufficient "continuous and systematic contacts" with the forum state to support "general jurisdiction," but a

single act by a nonresident defendant directed at the forum state can be enough to confer personal jurisdiction by "specific jurisdiction" if that act gives rise to the claim being asserted. *Ham v. La Cienega Music Co.*, 4 F.3d 413, 415-16 (5th Cir. 1993) (citing *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408 (1984)).

The minimum contacts prong, for specific jurisdiction purposes, is satisfied by actions, or merely a single act, by which the nonresident defendant "purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal Ind. Co. v. Superior Court of Cal.*, 480 U.S. 102, 109-22 (1987), and (2) the plaintiff's claims arise out of or relate to the defendant's purposeful contact with the forum. *Burger King*, 471 U.S. at 472. The nonresident's "purposeful availment" must be such that the defendant "should reasonably anticipate being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

But even if minimum contacts exist, the exercise of personal jurisdiction over a nonresident defendant will fail to satisfy due process requirements if the assertion of jurisdiction offends "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316. In determining this fundamental fairness issue, courts are to examine (1) the defendant's burden; (2) the forum state's interest; (3) the plaintiffs' interest in convenient and

effective relief, (4) the judicial system's interest in effective resolution of controversies; and (5) the state's shared interests in furthering fundamental social policies. *Asahi Metal*, 480 U.S. at 112.

In this case, the plaintiffs contend that Ruhrgas is subject to both specific jurisdiction and general jurisdiction. Expectedly, Ruhrgas argues that it is not subject to personal jurisdiction on either basis. The Court will consider each basis of personal jurisdiction *seriatim*.

A. Specific Jurisdiction

For the exercise of specific jurisdiction over a nonresident defendant to be proper, the nonresident defendant must have purposefully availed itself of the privilege of conducting activities within Texas, thus invoking the benefits and protections of its laws. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987). As stated above, specific jurisdiction exists over a nonresident defendant only if the nonresident defendant: (1) purposefully directed his activities at the residents of the forum state, *Asahi Metal*, 480 U.S. at 109-22, and (2) the plaintiff's claims arise out of or are directly related to the defendant's purposeful contact with the forum. *Wilson v. Belin*, 20 F.3d 644, 647 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 322 (1994) (citing *Helicopteros*, 466 U.S. at 414 n.8). The plaintiffs have failed to satisfy either of the prerequisites for the exercise specific jurisdiction over Ruhrgas.

The plaintiffs maintain that Ruhrgas is subject to specific jurisdiction in Texas due to Ruhrgas's attendance at three meetings in Houston concerning the Heimdal

Field. The meetings occurred in February 1987, November 1989, and April 1990. Each of these meetings concerned the sales contract between Ruhrgas and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 45, 48-49, 52-53, 58-60. The plaintiffs' claims concern misrepresentations and fraudulent conduct by Ruhrgas and Statoil which caused the plaintiffs to suffer losses by continuing to supply funds to MPCN. The plaintiffs' designated representative who attended all three of the Houston meetings, Mr. Burton Bossley, was unable to recall any discussion at the Houston meetings concerning the funding arrangement between the plaintiffs and MPCN. Bossley Deposition (Instrument #65, Exhibit 2) at 62-64. There is no evidence that Ruhrgas's alleged tortious conduct was aimed at Texas or that the brunt of any injury would be felt in Texas. Mr. Bossley was not even able to recall any false statements made by Ruhrgas at the Houston meetings. Bossley Deposition (Instrument #65, Exhibit 2) at 61-62.

The Court is to examine the relationship between Ruhrgas, the forum, and the litigation to determine whether jurisdiction is appropriate. *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 772 (5th Cir. 1988) (citing *Holt Oil & Gas*, 801 F.2d at 777)). In view of the nature of the plaintiffs' claims and Ruhrgas's contact with Texas, the Court concludes that the exercise of specific jurisdiction over Ruhrgas would not be proper. *Southmark Corp.*, 851 F.2d at 772. Additionally, Ruhrgas's presence in Texas was related to negotiations under the contract between Ruhrgas and MPCN. Since the contract between Ruhrgas and MPCN provided for arbitration in Sweden, Ruhrgas could not have expected to be haled into Texas courts

based on these meetings. The Court is aware that the personnel for MPCN who attended the meetings in Houston with Ruhrgas wore "several hats" (*i.e.*, the same individuals who represented MPCN also represented other Marathon entities at the same time), and Ruhrgas was possibly aware of the situation. Since there is no evidence that Ruhrgas engaged in any tortious conduct in Texas, however, Ruhrgas is not subject to specific jurisdiction based on MPCN's representatives wearing other entities' hats because Ruhrgas was in Houston due to the contract with MPCN and could only expect to have to engage in arbitration in Sweden.

B. General Jurisdiction

For a court to exercise general jurisdiction over a nonresident defendant, the defendant must have contacts with the forum state which are continuous, systematic, and substantial. *Wilson*, 20 F.3d at 649 (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 n.11 (1984). Perkins is the only case in which the Supreme Court has upheld the finding of general jurisdiction. *Amoco Egypt Oil Co. v. Leonis Navigation Co., Inc.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993). "The leading Supreme Court case on general jurisdiction is *Helicopteros* . . . . " *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 181 (5th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993). In order to determine whether Ruhrgas's contacts constitute the kind of continuous and systematic general business contacts to support general jurisdiction, the Court must explore the nature of Ruhrgas's contacts with Texas. *Helicopteros*, 466 U.S. at 415-16.

The plaintiffs contend that Ruhrgas is subject to general jurisdiction based on the following contacts with Texas. In 1994, Ruhrgas acquired a twenty percent share of Houston based Tenneco Energy Resources Corporation ("TERC") for $47 million. Instrument #63. Exhibit 11. The purchase of the TERC stock was negotiated in Houston. Benke Deposition (Instrument #63, Exhibit 12) at 41. Ruhrgas has one member on the five member board of directors of TERC. *Id.* at 7. The Ruhrgas board member and two other Ruhrgas officials travel to Houston three times each year for TERC's board meetings. Benke Affidavit (Instrument #5, Exhibit D). These individuals from Ruhrgas also attend about nine other meetings per year in Houston in relation to TERC which appear to have occurred on combined trips. Instrument #63, Exhibit 12 at 15, 65-67, 69-70. Ruhrgas personnel have possibly traveled to Texas for meetings with various US oil companies. *Id.* at 77-78. Ruhrgas maintains an employee training program with TERC wherein young low-level Ruhrgas employees are temporarily assigned to work in Houston for TERC under TERC's direction. Falkenhausen Deposition (Instrument #63, Exhibit 21). These employees are generally paid by TERC, unless the assignment to TERC is for less than a year, in which case Ruhrgas continues to pay them. *Id.* at 19. While the employees are assigned to TERC, Ruhrgas pays them overseas bonuses and salary differentials, subsidizes Houston housing expenses, and subsidizes the employees' children's educational expenses in Houston. *Id.* at 15, 19, 20, 21, 26. The plaintiffs also point out that while the Ruhrgas employees are assigned to TERC, they are considered to simultaneously be employees of Ruhrgas. Instrument #63, Exhibit 25. The

plaintiffs have provided a summary of Ruhrgas's purchase orders from April 1983 through October 1995 which reveal about one million dollars in purchases in Texas during the last twelve years. Instrument #63, Exhibit 26. Additionally, it appears that Ruhrgas has paid over $700,000 to a Dallas based firm for reservoir evaluation services over the last twenty years. Instrument #63, Exhibit 27. Based on these contacts with Texas, the plaintiffs maintain that Ruhrgas has systematic and continuous contacts with Texas that will support general jurisdiction over Ruhrgas.

With respect to Ruhrgas's stock ownership of TERC and its participation in TERC related activities, it is settled that even complete stock ownership and common officers and directors are not sufficient to attribute the contacts of one entity to another. *Dunn v. A/S Em. Z. Svitzer*, 885 F.Supp. 980, 985 (S.D.Tex. 1995) (citing *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1987)). Therefore, Ruhrgas's ownership interest in TERC is not a factor in determining continuous and systematic contacts in Texas. With respect to Ruhrgas's employees that are assigned to TERC, the Fourth Circuit in *Ratliff v. Cooper Lab., Inc.*, 444 F.2d 745 (4th Cir.), *cert. denied*, 404 U.S. 948 (1971), held that general jurisdiction did not exist over a nonresident defendant in spite of the defendant having five salesmen living in the forum state who promoted the defendant's products to customers in the forum state. In the instant case, the Ruhrgas employees that are assigned to work in Houston are not doing work for Ruhrgas. They are working for TERC on TERC projects. The Court concludes that the presence of the Ruhrgas employees in Houston provides an even less

compelling basis to support general jurisdiction over Ruhrgas than did the salesmen in *Ratliff*.

The remaining contacts that Ruhrgas has with Texas (*i.e.*, training sessions and purchases in Texas) do not support general jurisdiction based on *Helicopteros*. Similar contacts with Texas were found to be insufficient to support general jurisdiction in *Helicopteros*. *Helicopteros* was a wrongful death case brought in Texas state court against Helicopteros, a Colombian corporation, after a helicopter crash in Peru. The Supreme Court held that Helicopteros was not subject to general jurisdiction in Texas in spite of: (1) its CEO having attended a meeting in Texas; (2) its having accepted checks drawn on a Texas bank; (3) its employees attending training sessions in Texas; and (4) its having made four million dollars in purchases from a Texas business during a seven year period. Ruhrgas's attending meetings in Texas and purchasing less than two million dollars in products and services from Texas businesses falls short of the level of contacts that Helicopteros had with Texas which the Supreme Court held were insufficient to establish general jurisdiction. Therefore, Ruhrgas has not had systematic and continuous contacts with Texas which subject it to general jurisdiction in Texas.

Because the Court has concluded that there is no general or specific jurisdiction over Ruhrgas, the Court need not consider whether the exercise of jurisdiction over Ruhrgas would comport with traditional notions of fair play and substantial justice.

V. Conclusion

In accordance with the foregoing, the Court hereby

ORDERS that Ruhrgas's Motion for Reconsideration of Order Denying Motion for Stay Pending Arbitration, or in the Alternative, To Vacate and Defer Ruling Pending Discovery (Instrument #39) is **DENIED**; and

ORDERS that Ruhrgas's Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(2) (Instrument #4) for lack of personal jurisdiction is **GRANTED**.

The Court further

ORDERS that the plaintiffs' Motion to Remand (Instrument #12) and Ruhrgas's Motion to Dismiss on *Forum Non Conveniens* Grounds (Instrument #8) are **DENIED as moot.**

SIGNED at Houston, Texas, this 29th day of March 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, Plaintiffs, vs. RUHRGAS, A.G., Defendant.	§	CIVIL ACTION NO. H-95-4176

ORDER OF DISMISSAL

In accordance with the Court's Memorandum and Order of this day granting defendant Ruhrgas, A.G.'s motion to dismiss for lack of personal jurisdiction, the Court hereby

ORDERS that this case be **DISMISSED** for lack of personal jurisdiction over defendant Ruhrgas, A. G.; and

ORDERS that Ruhrgas, A.G. shall recover its costs of court.

SIGNED at Houston, Texas, this 29th day of March, 1996.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, Plaintiffs, vs. RUHRGAS, A.G., Defendant.	§	CIVIL ACTION NO. H-95-4176

MEMORANDUM AND ORDER

Pending before the Court is defendant Ruhrgas, A.G.'s ("Ruhrgas") Motion for Stay Pending Arbitration (Instrument #6). Plaintiffs Marathon Oil Company, Marathon International Oil Company, and Marathon Petroleum Norge A/S (collectively "Marathon") brought this action alleging various tort based claims against Ruhrgas, which is a German company, for conduct by Ruhrgas in relation to a contract between Ruhrgas and Marathon Petroleum Company (Norway) ("MPCN"), which is an affiliate of the plaintiffs. In the instant motion, Ruhrgas contends that the arbitration clause in the contract between it and MPCN is binding on the plaintiffs and the case should be stayed pending arbitration. After considering the parties' submissions and the applicable law, the Court finds that the motion to stay should be **DENIED**.

The basis of the case is the development of the natural gas Heimdal Field ("the field") located in the Norwegian North Sea. The plaintiffs' affiliate MPCN entered into an agreement with Ruhrgas to sell its share of the gas from the field to Ruhrgas. The plaintiffs maintain that Ruhrgas and non-party Statoil conspired to have MPCN and the plaintiffs pay for the development of the field and then lock MPCN into the agreement which was not profitable. The plaintiffs claim that they have suffered losses due to the loans they made to MPCN as a result of Ruhrgas's conduct. The plaintiffs contend that Ruhrgas, by its actions with non-party Statoil, is liable to the plaintiffs for fraud, tortious interference with prospective business relationships, participation in breach of fiduciary duty, constructive fraud, and civil conspiracy.

It is undisputed that the agreement between MPCN and Ruhrgas contains an arbitration clause. The arbitration clause provides in pertinent part that:

> All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement . . . shall exclusively and finally be settled by arbitration in Stockholm, Sweden . . .

Heimdal Gas Sales Agreement at article 15 (Instrument #1, Exhibit B, Exhibit #2 (filed under seal as Instrument #3)). With respect to the instant motion, the main dispute is whether the arbitration clause is binding on the plaintiffs, who admittedly did not sign the agreement.

Ruhrgas contends that this case should be stayed pending arbitration pursuant to sections 1 and 3 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) ("the Convention") and 9 U.S.C. §§ 3 and 208. The Fifth Circuit has held that the Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:

> (1) is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
>
> (2) does the agreement provide for arbitration in the territory of a Convention signatory;
>
> (3) does the agreement to arbitrate arise out of a commercial legal relationship; and
>
> (4) is a party to the agreement not an American citizen?

Sedco, Inc. v. Petroleos Mexicanos Mexican National Oil Co., 767 F.2d 1140, 1144-45 (5th Cir. 1985) (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982)). The parties must concede that Sweden is a signatory to the Convention, the dispute arises out of a commercial legal relationship, and Ruhrgas is not an American citizen. The only requirement that is not clearly present is whether there is an agreement in writing to arbitrate the dispute.

"[T]he Arbitration Act [9 U.S.C. § 1 *et seq.*] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is construction of the contract language itself or an allegation of waiver,

delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1982); *Sedco, Inc.*, 767 F.2d at 1147-48. However, arbitration is contractual by nature since "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus, while there is a strong and "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), such agreements must not be so broadly construed as to encompass claims and parties that were not intended by the original contract. *Thomson-CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 776 (2nd Cir. 1995). The Court concludes that while the arbitrator is to determine whether a specific issue is arbitratible,[1] in this instance, the Court must first determine whether any of the plaintiffs' claims are arbitratible.

The parties have not cited, and the Court has not found through its own research, any Fifth Circuit cases which deal with the exact situation presented in the instant case. Ruhrgas, however, has presented several somewhat similar cases from other circuits in support of its contention that the plaintiffs are bound by the arbitration clause to which MPCN consented. Ruhrgas also

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[1] In fact, if the plaintiffs are bound by the arbitration clause between Ruhrgas and MPCN, the claims asserted by the plaintiffs would fit within the arbitration clause because of the language "arising out of or relating to" which the Fifth Circuit has held to extend to tort claims arising out of the business relationship between the opposing parties. *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1265 (5th Cir. 1994).

argues that under Fifth Circuit law, the doctrine of virtual representation binds the plaintiffs to the arbitration clause. The plaintiffs have attempted to distinguish the various cases cited by Ruhrgas and essentially argue that they are not bound by the arbitration clause because of the law of corporations and because a corporate parent is not bound by its subsidiaries' arbitration agreements.

An initial review of the cases cited by Ruhrgas is warranted. *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984), involved the arbitrability of claims between a construction manager and an electrical contractor on a construction project. Both of the parties had contracts with the owner of the project, St. Margaret's Hospital. Each of the parties' contracts with the hospital contained arbitration clauses with the hospital. Triangle filed a suit against McBro, the construction manager, alleging a tort claim for intentional interference with Triangle's contract with the hospital and for negligence. *Id.* at 343. The district court granted McBro's motion to compel arbitration of the claims and Triangle appealed claiming there was no written agreement between McBro and Triangle to arbitrate their differences.

In spite of the contracts specifying that there was no contractual relationship between McBro and the contractors, such as Triangle, the Eleventh Circuit held that the arbitration clauses were enforceable between McBro and Triangle. *Id.* at 343-44. The Eleventh Circuit based its holding on the theory that equitable estoppel bars arguing that there was no written agreement between the parties because the basis of Triangle's claim against

McBro was that McBro breached the duties and responsibilities assigned it by the owner/construction manager contract. *Id.* at 344. The Court considered Triangle's claims to be "intimately founded in and intertwined with the underlying contract obligations." *Id.* (citing *Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981); and noting the federal policy favoring arbitration). The Eleventh Circuit indicated that the result would certainly be different if Triangle's claim was for a battery by McBro which would clearly be beyond the scope of the contracts. *Id.* at 343-44. This Court considers it significant, however, that both McBro and Triangle had agreed to arbitrate claims arising out of the construction project with the hospital. In the instant case, the plaintiffs never independently agreed to arbitrate any claims.

In *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988), the Fourth Circuit held that "[w]hen the charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement." *Id.* at 320-21. In *J.J. Ryan*, the plaintiff, J.J. Ryan & Sons, Inc., was an importer who brought suit against Rhone Poulenc Textile, S.A. and four of its affiliated corporations. *Id.* at 316. Ryan had imported products made by Rhone's affiliates and had agreements with the affiliates which required that all disputes be arbitrated. *Id.* at 316-17. Thereafter, Rhone essentially tried to have the affiliates take on the distribution function, rather than have Ryan do it. *Id.* at 317. Ryan filed suit against Rhone alleging various tort causes of action.

Rhone subsequently moved to have the case referred to arbitration. Ryan was opposed to arbitration because it had no contractual relation with Rhone. *Id.* at 320.

The Fourth Circuit held that the dispute between Rhone and Ryan was referable to arbitration because the claims against Rhone, the parent company, were based on the same facts and inseparable from any claims against the subsidiaries. *Id.* at 320-21. The Fourth Circuit based this holding in part on the Fifth Circuit's statement that "[i]f the parent corporation was forced to try the case, the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." *Id.* at 321 (quoting *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976)[2]). An important distinction between *J.J. Ryan* and the instant case is that the party who had not consented to arbitration with the other was trying to enforce arbitration on a party who had at least agreed to arbitrate its claims with the subsidiaries. In the instant case, however, Ruhrgas is trying to force arbitration on the plaintiffs, who have not consented to arbitration with anyone.

In *Foster v. Sears, Roebuck & Co.*, 837 F.Supp. 1006 (W.D.Mo. 1993), Tonya Foster purchased a Sears catalog

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[2] Although *Sam Reisfeld* is a Fifth Circuit case, it is not directly applicable in the instant case. While the opinion is not clear about the district court's order, a review of the case indicates that the issue was whether the claims against the parent company should be stayed pending arbitration of the claims against the subsidiaries. *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F.2d 679, 681 (5th Cir. 1976). The opinion does not indicate that the claims against the parent company were actually referred to arbitration. *See Id.*

store, and when Sears ceased its catalog operations, she and her husband filed suit against Sears for the resulting damages based on tort causes of action. *Id.* at 1007. Tonya Foster had entered into a catalog sales merchant agreement with Sears that provided for arbitration of disputes. *Id.* at 1007-08. The parties conceded that the claims by Tonya Foster were required to be arbitrated but contested the arbitrability of the claims asserted by the husband who did to enter into the contract with Sears. *Id.* at 1008. The district court held that the husband had expected to benefit from the contractual relationship with Sears so he should be bound by the arbitration clause. *Id.* In so holding, the district court cited to a similar case which noted that "[the non-signatory spouse] alleges no entitlement to damages distinct from those allegedly suffered [by the signatory spouse]. . . . " *Id.* (citing *A.L. Williams & Assoc. v. McMahon*, 697 F.Supp. 488, 494 (N.D. Ga. 1988)). However, *Foster* reiterated that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Foster*, 837 F.Supp. at 1008 (quoting *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 485 (1989)). The district court went on to say that "nonsignatories to a contract containing an arbitration clause may be deemed parties thereto, through ordinary contract principles, for purposes of determining whether they should be compelled to arbitrate a dispute." *Foster*, 837 F.Supp. at 1008 (citing *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)).

In *Ripmaster v. Toyoda Gosei Co., Ltd.*, 824 F.Supp. 116 (E.D. Mich. 1993), an employee attempted to file suit against the defendant company which had a consulting

agreement with the employee's employer that required arbitration of disputes. The district court held that the plaintiff employee's claims were required to be arbitrated even though he had not signed the arbitration agreement since he was a third-party beneficiary to it. *Id.* at 117. It appears from the opinion, however, that the plaintiff's damages were due to the defendant's alleged breach of the contract with the employer. *Id.* at 118. In the instant case, Marathon's claims are based on representations and actions by Ruhrgas in relation to Marathon, not in relation to MPCN.

While arbitration clauses were enforced on parties who had not signed the arbitration clause in the four preceding cases, it cannot be said that the clause at issue in this case is enforceable against the plaintiffs. In the preceding cases, the party against whom the arbitration was enforced had either consented to arbitration of the dispute with at least some party or the party had a relationship with one who had consented to arbitration such that the arbitration clause was binding based on contract principles. Ruhrgas's recognition of this requirement is evident by its arguing that the Marathon plaintiffs are third-party beneficiaries to the contract between Ruhrgas and MPCN and that the Marathon plaintiffs are bound to arbitrate the claims because they are in privity with MPCN under the virtual representation doctrine.

Ruhrgas contends that under Fifth Circuit law, the virtual representation doctrine applies in this case and binds the plaintiffs to the arbitration clause in the contract between Ruhrgas and MPCN. The virtual representation doctrine "demands the existence of an express or implied legal relationship in which parties to the first suit

are accountable to non-parties in the second suit." *Pollard v. Cokrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). The Fifth Circuit has described the types of relationships which qualify for virtual representation to be "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee." *Id.* at 1008-09 (quoting *Southwest Airlines Co. v. Texas Intern. Airlines, Inc.*, 546 F.2d 84, 97 (5th Cir. 1977), *cert. denied*, 434 U.S. 832 (1977)). Ruhrgas claims that since the plaintiffs and MPCN are all subsidiaries of Marathon Oil Company, the plaintiffs have the same interests as MPCN and are in privity with MPCN. Instrument #7 at 16.

Based on the argument that the plaintiffs are in privity with MPCN, Ruhrgas maintains that "[w]hile the Fifth Circuit has not expressly decided the issue, . . . [it] has suggested that a non-party to an arbitration agreement may be bound to arbitrate if it is in privity with a party to the agreement under the virtual representation doctrine." *Id.* at 15. In support of this, Ruhrgas relies on a footnote which provides that the question of whether a nonsignatory can be bound to an arbitration agreement would be closer if the signatory and nonsignatory could be considered in privity so that an arbitrator's award for the signatory would have preclusive effect against the nonsignatory. *In re Talbott Big Foot, Inc.*, 887 F.2d 611, 614 n.4 (5th Cir. 1989). The Fifth Circuit went on to state that privity in this context requires some type of legal relationship between the two entities so that the one engaged in the litigation is legally accountable to the other. *Id.* In the instant case, however, the claims asserted by the plaintiffs are independent of any contract claims that

MPCN could have or might assert against Ruhrgas. Thus, the Court concludes that the doctrine of virtual representation is not applicable in this case to bind the plaintiffs to the arbitration clause signed by MPCN.

The Second Circuit recently discussed the theories under which nonsignatories can be bound to arbitration agreements. The Second Circuit stated that the theories arise out of common law principles of contract and agency law and are: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. *Thomson-CSF, S.A. v. American Arbitration Assoc.*, 64 F.3d 773, 776 (2nd Cir. 1995). The incorporation by reference, assumption, and agency principles certainly do not apply in the instant case. Furthermore, Ruhrgas has not made any allegations that MPCN is the alter ego of any of the plaintiffs.

The estoppel theory is the only basis for the plaintiffs to be bound by the arbitration clause. The estoppel theory has been applied to require a signatory to arbitrate with a nonsignatory because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were 'intimately founded in and intertwined with the underlying contract obligations.' " *Id.* (citations omitted). The estoppel theory applies where **a nonsignatory is attempting to force a signatory to arbitrate**. It does not apply where, as in the instant case, a signatory to the arbitration clause, Ruhrgas, is attempting to bind parties which have never consented to arbitration with anyone.

Based on the discussion of the preceding cases and since plaintiffs have never consented to arbitrate any claims with any of the parties and the plaintiffs' claims are independent of any contract claims MPCN might assert, the Court concludes that the plaintiffs have not waived their right to trial by consenting to arbitrate their claims. Accordingly, the Court

ORDERS that Ruhrgas's motion for stay pending arbitration is **DENIED**.

SIGNED at Houston, Texas, this 15th day of November 1995.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT
JUDGE

APPENDIX E

ARTICLE 15

15. RESOLUTION OF CLAIMS AND DISPUTES

All claims, disputes and other matters arising out of or relating to this Agreement which the Parties are unable to resolve by mutual agreement within forty-five (45) days of the date the dispute first arose, except those matters that are to be referred to an expert in accordance with the terms and procedures set forth in Article 14 hereof, shall exclusively and finally be settled by arbitration in Stockholm, Sweden, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris or, in the absence of any applicable rule, with the Procedural Laws of Sweden.

Unless otherwise agreed by the Parties such arbitration shall be conducted by three (3) arbitrators, one (1) selected by each Party and the third arbitrator nominated by the arbitrators so selected within thirty (30) days after the appointment of the second arbitrator. The third arbitrator shall act as the chairman of the board of arbitration and shall be fully educated and trained to be a lawyer. The arbitration proceedings shall be conducted in English.

Any arbitral award shall be enforceable in accordance with the rules of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Judgment upon the award rendered may be entered in any court or other authority having jurisdiction or application may be made to said court or other authority for a judicial acceptance of the award and an order of enforcement, as the case may be.

ARTICLE 16

16. APPLICABLE LAW

This Agreement shall be governed by and construed in accordance with Norwegian law.

Marathon Petroleum Company (Norway)
Utenlandsk Aksjeselskap
/S/

Distrigaz S.A.

/S/

Gaz de France
/S/

Gelsenberg AG
/S/

Gewerkschaft Brigitta
/S/

N.V. Nederlands Gasunie
/S/

Ruhrgas AG

/S/

Thyssengas GmbH
/S/

APPENDIX F

Botschaft
der Bundesrepublik
Deutschland

Embassy
of the Federal Republic
of Germany

Note Verbale No. 75/95

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to inform of the following:

The Government of the Federal Republic of Germany has been made aware that companies of the Marathon Oil group of companies have filed an action in state court in Houston, Texas, against Ruhrgas AG, a German corporation based in Essen, Germany. The action filed arises in connection with the delivery of natural gas to Germany from an area of the North Sea, known as the Heimdal field, belonging to the Kingdom of Norway. Formally, damages are claimed. The underlying intention, however, seems to be to obtain a substantial increase in price for the natural gas delivered. The matter has previously been arbitrated. The Marathon companies are now seeking in a Texas state court to circumvent the arbitration clause in the contract among Marathon, Ruhrgas, and the Norwegian state oil company, even though disputes among the participants in the exploration of natural gas in the North Sea have traditionally been resolved by arbitration as contractually agreed to by the participants here.

The Government of the Federal Republic of Germany wishes to declare that it considers the Marathon case to be a matter of federal interest for Germany.

Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80% of the gas must be imported, natural gas imports are a major issue in national energy policy. Imports from Norway are particularly important. As Germany's Minister of Economics, Dr. Guenter Rexrodt, stated on April 20, 1994, in a public speech "For Germany, Norway is a particularly important partner in energy supplies. There is no other country from which we buy comparable quantities of energy (oil and gas). We do not see any reason for concern about our growing dependence on Norwegian energy supplies; for it is founded on the sound and reliable basis of amicable political relations and close cooperation of the companies involved.

Natural gas imports into Germany are governed by long-term import agreements to ensure an uninterrupted supply. On the German side, the agreements are concluded by companies that are monitored by the national energy authorities. Due to their long-term impact on economic stability, these agreements are subject to state approval pursuant to the German Foreign Trade and Payments Act.

The gas pipelines linking Norwegian fields to Germany are an important issue for both states. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the

Norwegian continental shelf to the German coast. Similar treaties exist or are being negotiated for pipelines from the Norwegian continental shelf to the Belgian and French coasts among the respective governments.

The United States has historically taken a keen interest in the energy supply situation in Europe. This interest was demonstrated by the U.S. attitude in connection with the purchase of additional gas from the former Soviet Union in the early 1980s. The United States imposed an embargo on non-U.S. companies participating in the purchase of Soviet gas and supported the development of the Norway's North Sea gas fields as an alternative.

The United States, Germany, and Norway, as well as many other Western European states are participating countries in the International Energy Agency dealing with international aspects of energy and with the international security of supply.

Because of these national and international interests, jurisdiction over the Marathon case should be assumed by a federal rather than a local tribunal.

The United States and Germany are parties to a number of treaties implicated in the case filed by Marathon: (1) the so-called New York Convention concerning the recognition and enforcement of foreign arbitral awards; (2) the GATT (now WTO), dedicated generally to international economic cooperation, with goals of open, fair and undistorted competition and non-discriminatory trade; and (3) the so-called Hague Convention on the service abroad of judicial and non-judicial documents.

In the view of the Federal Republic the necessity of resolving issues relating to these treaties, as well as the general international importance of the case filed by Marathon, requires that a federal court take jurisdiction over it.

The Government of the Federal Republic of Germany considers it extremely important that the terms and conditions of natural gas import agreements be strictly complied with. If gas supplied by one European state to another European state gives rise to a dispute between the companies involved, such disputes must be settled in strict accordance with the contractual agreements so as to maintain confidence in the reliability of international trade relations. An energy-importing country like the Federal Republic of Germany must place special emphasis on this principle.

If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies not directly bound by these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of international legal and commercial relation would be gravely affected.

The availability of natural gas from Norwegian reserves for the German market is based on good and amicable relations between the Kingdom of Norway and the Federal Republic of Germany. Since Norway has rich natural gas reserves and Germany is dependent on

energy imports, disputes arising in connection with natural gas supplies from Norway to Germany may have undesirable effects on relations between the two countries. It is not least for this reason that the government of the Federal Republic of Germany deems it appropriate and essential to provide for the settlement of any dispute by arbitration in an international court of arbitration. It is therefore standard practice in Europe to incorporate an arbitration clause in all agreements on natural gas imports from Norway. Any attempt to bypass such an arbitration clause should be doomed to failure.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 15, 1995
[Seal]

Department of State
Washington, D. C.

Office of Austria, Germany
and Switzerland Affairs
Room 4228
2201 C Street, N.W.
Washington, D.C. 20520

cc. Mrs. Linda Jacobson
U.S. Department of State
Office of the Legal Adviser
L/SFP
Room 54220
2201 C Street, N.W.
Washington, D.C. 20520

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S, Plaintiffs,	§	CIVIL ACTION NO. H-95-4176
v.	§	
RUHRGAS, A.G., Defendant.	§	

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF RUHRGAS

I. Interest of the Amicus Curiae

The Federal Republic of Germany has a vital national interest in securing an adequate and uninterrupted supply of natural gas at competitive market prices. The instant case threatens this vital national interest in two ways. First, plaintiffs have brought this case in a local rather than a federal tribunal although the case manifestly presents substantial issues of international law and foreign relations. Second, plaintiffs have attempted to circumvent the arbitration clause in the agreements to which their affiliate is a party although the clause clearly covers the controversy presented by this case. The clause requires arbitration in Europe where the controversy arose. In the view of the Federal Republic of Germany, this Court should take subject-matter jurisdiction over

this case and stay or dismiss the case in favor of arbitration or litigation in Europe to ensure that adverse consequences for international relations do not result.

II. Statement of the Case

Plaintiffs filed this action in the 152d Judicial District Court of Harris County, Texas. Upon motion by the Defendant, Ruhrgas, A.G. (hereinafter "Ruhrgas"), the case was removed to this Court. Plaintiffs, Marathon Oil Company and certain of its affiliates (hereinafter sometimes "Marathon"), filed a motion to remand the case to Texas state court. Ruhrgas opposed the motion to remand asserting that the Court had subject-matter jurisdiction over this case, and moved for a stay pending arbitration, or for dismissal on the grounds of *forum non conveniens* or lack of personal jurisdiction. The Court denied Ruhrgas' motion for a stay pending arbitration and permitted discovery on certain jurisdictional issues. Memoranda and Orders entered November 17, 1995 and January 3, 1996. Ruhrgas' motion for reconsideration of the order denying stay pending arbitration and its motions to dismiss on various grounds as well as Marathon's motion to remand are now pending for decision by the Court.

III. The First Amended Petition and the Note Verbale

A. The First Amended Petition

Although many of the allegations of the First Amended Petition are hotly contested, we summarize them here to show that even accepting every well-pleaded allegation in the petition, the Court has subject-

matter jurisdiction, and the case should be stayed or dismissed in favor of arbitration in a European forum. Material in parenthesis is not in the petition but otherwise supported by the record.

According to the First Amended Petition, this case "arises out of" a conspiracy among Ruhrgas, a company controlling 80% of the German market for natural gas, Statoil, the state oil and gas company of the Kingdom of Norway, and others, including Distrigaz, the state gas company of the Kingdom of Belgium, to monopolize the Western European market for natural gas. ¶¶ 6, 9, 11, and 27. A natural resource is involved, the Heimdal gas field, which is located in Norway's portion of the European continental shelf. ¶ 14. Through Statoil, Norway, with a 40% share, is the largest equity owner of the field; the second largest, with a 24% share, is Marathon. ¶¶ 14-15.

Plaintiffs are Marathon Oil Company, and certain of its subsidiaries, but not the Marathon subsidiary, Marathon Petroleum Company (Norway) ("MPCN"), that actually has a contract with Ruhrgas and other European parties to deliver natural gas from the Heimdal gas field to Western Europe (and that by way of assignment from plaintiff Marathon Petroleum Norge A/S enjoys all rights and performs all duties under the Heimdal license). ¶¶ 1-3. MPCN is referred to in the complaint only as one of Marathon's "affiliates." ¶¶ 26, 29, 32. Neither Statoil, Distrigaz, the Kingdom of Norway, nor the Kingdom of Belgium, are named as defendants.

The first misrepresentation alleged in the petition is a promise by Statoil (not Ruhrgas) that the cost of the construction of a new, (majority state-owned), pipeline,

referred to only as "Statpipe," could be recouped by Marathon by means of a transportation charge or "tariff" on all gas flowing through the pipeline. ¶¶ 17-18. Statoil then brought Marathon and its co-venturers (evidently including Statoil) together with a consortium headed by Ruhrgas, which agreed to pay the venturers a formula then yielding $6.16 per mcf for the gas. ¶ 19. This agreement is the only alleged representation by Ruhrgas to Marathon that the petition describes explicitly. Based on this representation and others that are never described, Marathon allegedly advanced over $300 million for the development of the Heimdal field. ¶ 21.

At some point during the foregoing, Statoil discovered the Troll field, which was some 40 times larger than Heimdal. ¶ 22. Statoil agreed to commit the Troll gas to Ruhrgas at $2.201 per mcf and Statoil also committed to lower the Heimdal price to Ruhrgas. ¶ 23. MPCN (, however, refused to go along and when a dispute as to the validity of the supply contract between MPCN and other Continental buyers arose) initiated arbitration and was successful as against Ruhrgas (and other buyers) but not against Distrigaz, the Belgian state gas company. Eventually as a result of what plaintiffs' [sic] claim to be Ruhrgas' economic coercion, they claim that MPCN had to agree to an amendment of its agreement with Ruhrgas. ¶¶ 24-29.

Although § 30 of the Petition is difficult to understand, it seems to say that in the course of renegotiating the agreement with Ruhrgas and the other European buyers, Statoil (not Ruhrgas) misrepresented that it would route the gas from the Troll field through Statpipe (the majority state-owned pipeline of the Kingdom of

Norway) with the result that the tariff on Heimdal gas would decrease. ¶ 30. Early in 1995, however, Statoil announced that it would not connect the Troll field to Statpipe. ¶ 32. But for Statoil's "misrepresentations to Marathon regarding increased shipments of gas through Statpipe and the related cost reductions," the factual portion of the Petition concludes, "[p]laintiffs would have filed this action years ago." *Id.*

B. Germany's Note Verbale

The Federal Republic of Germany submitted its Note Verbale No. 75/95 to the United States Department of State on December 15, 1995. A copy of the note is attached hereto as Exhibit 1.

The Note Verbale states in pertinent part that Germany has a strong public interest in secure and reasonably priced energy supplies. Because natural gas provides a substantial proportion of Germany's energy supplies and 80% of the gas must be imported, natural gas imports are a major issue in national energy policy. Imports from Norway are particularly important. The governments of Germany and Norway concluded bilateral treaties in 1974 and 1993 to define the sovereign powers of the two states with regard to the pipelines from the Norwegian continental shelf to the German coast. The United States has historically taken a keen interest in the energy supply situation in Europe and encouraged the development of Norway's North Sea fields as an alternative to Soviet gas. ¶¶ 4-8.

The Note Verbale further states that the United States and Germany are parties to a number of treaties implicated in the case filed by Marathon, in particular the so-called New York Convention[1] concerning the recognition and enforcement of foreign arbitral awards. If the legal opinion came to prevail that in international trade a party to a contract can avoid binding contractual agreements, such as, in this case, prices and the arbitration clause, by having affiliated companies that are not signatories to these contractual agreements file an action for damages in a forum non conveniens and if such forum were to rule on the merits of the case, the reliability of international legal and commercial relations would be gravely affected. ¶¶ 10-13.

IV. Summary of Argument

Because of the critical national interests of Germany and many other European countries that are implicated in this case, weighty issues of foreign relations are presented on the face of the First Amended Petition. For this reason, this case "arises under" the laws of the United States and this Court, that is, a federal court has subject-matter jurisdiction.

The Supreme Court has commanded that arbitration should be compelled unless the Court can be positive that the arbitration clause does not cover the dispute. This

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *reprinted in* 9 U.S.C. § 201 note (West Supp. 1995) and 9 U.S.C. §§ 3 and 208.

Court has already ruled that the claims in question are within the scope of the broad arbitration clause contained in the agreement. Plaintiffs nevertheless argue that they are not bound because they are not signatories. In view of Marathon Oil's control over the subsidiary, MPCN, that is bound by the arbitration agreement and of Marathon Oil's involvement in the proceedings that led to this case, the arbitration clause should be interpreted to bind the plaintiffs.

In view of all the factors to be weighed in deciding whether this Court is a *forum non conveniens*, in particular, that most of the evidence is located in Europe, and that the law of Norway will be applied, the case should be dismissed in favor of refiling in a European forum, either arbitral or national.

Finally, because Ruhrgas has had so little contact with Texas, it would be fundamentally unfair to require it to litigate here, so the case should be dismissed for lack of personal jurisdiction.

V. Argument

The Federal Republic of Germany supports Ruhrgas' opposition to plaintiffs' motion to remand. Germany also supports Ruhrgas' dispositive motions in this case, in particular, its motion for reconsideration of order denying motion for stay pending arbitration. Plaintiffs should not be allowed to avoid both federal jurisdiction and arbitration by the subterfuge of proffering themselves rather than MPCN as the party in interest.

A. This Court has federal question jurisdiction over this case because the necessity for the resolution of many issues of federal law appears on the face of the well-pleaded complaint.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, law, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" § 1331 when it is brought to enforce a right of action created by state law, where the vindication of a right under state law "necessarily" turns on some construction of federal law. *Franchise Tax Board v. Laborers Vac. Trust*, 463 U.S. 1, 9 (1983), citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). One distinguished commentator has restated the *Franchise Tax Board* test as follows:

> A case . . . "arises under" federal law . . . if it is brought to enforce a right of action created by state law, if under orderly rules of pleading and proof the plaintiff, as part of his case in chief, must establish the correctness and applicability of a proposition of federal law in order to prevail.

Hart & Wechsler, *The Federal Courts and the Federal System*, (3rd. Ed., 1988), p. 995. It is well-established that the federal issue must be "substantial." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986).

Although for a period in Constitutional history, the exclusively federal nature of international law was not established, "all that . . . changed when the Supreme Court decided [*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)]." L. Henkin, *Foreign Affairs and the Constitution*, (The Foundation Press, 1972), p. 217. In *Sabbatino*,

the Supreme Court held that, due to the significance of choices ordering the United States' relationships with other members of the international community, such issues "*must* be treated *exclusively* as an aspect of federal law." *Id.*, at 425, emphasis supplied. Although *Sabbatino* dealt only with the "act of state doctrine," it is now apparent that claims raising questions of foreign relations present issues of federal common law. *See Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (1981); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352-354 (2d Cir. 1986), *cert. dismissed*, 480 U.S. 942 (1987); *Sequiha v. Texaco, Inc.*, 847 F. Supp. 61, 62-63 (S.D. Tex. 1994); *Kern v. Jeppsen Sanderson, Inc.*, 867 F. Supp. 525, 531-532 (S.D. Tex. 1994).

In *Radcliff Materials*, the Supreme Court stated that although there was no general common law, citing *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), the Court had recognized the need and the authority to formulate federal common law in two areas. The first of these was where a federal rule of decision was necessary to protect uniquely federal interests, in particular, "international disputes implicating . . . our relations with foreign nations," *Radcliff Materials*, at 641. In such instances, the Court said:

> . . . our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Id., at 640-641.

In *Marcos*, the Second Circuit held that there was federal question jurisdiction over actions having important foreign policy implications, citing the Supreme Court in *Merrell Dow, supra*, at 810, to the effect that in "close" cases the federal court should assume jurisdiction where the federal foreign relations interest was sufficiently important. *Marcos* at 353. The Court noted that in some areas of law, federal law was so powerful as to preempt entirely any state cause of action. The Court ruled that the federal common law in the area of foreign affairs was "probably" sufficiently powerful to displace the state cause of action presented in that case. Federal jurisdiction was present in any event because the claim raised, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future process in the foreign state. *Marcos* at 354

In *Sequiha*, residents of Ecuador asserted a variety of causes of action in this Court arising out of pollution accompanying petroleum development in that country. Chief Judge Black noted that the conduct in question was regulated by the Republic of Ecuador, which owned the land in issue and treated all petroleum exploration as a public utility controlled by the government. He also noted that the Government of Ecuador had officially protested the litigation, as the Federal Republic of Germany has in its Note Verbale of December 15, 1995. The Court held that such matters affected international law and the relationship between the United States and foreign governments and gave rise to federal question jurisdiction. *Sequiha* at 62.

The *Sequiha* court dismissed the case on the basis of the comity of nations and the doctrine of *forum non conveniens*. The Court noted that under the doctrine of comity a court should decline to exercise jurisdiction under certain circumstances in deference to the laws and interest of a foreign country. Because, among other things, the challenged activity and alleged harm had occurred entirely in Ecuador, the challenged activity was regulated by the Republic of Ecuador, the exercise of jurisdiction would interfere with Ecuador's sovereign right to control its own environment and resources, and the Republic of Ecuador had expressed its strenuous objection to the exercise of jurisdiction by the Court, the case was dismissed under the doctrine of the comity of nations. *Id.* at 63. The Court also dismissed on the basis of *forum non conveniens*. *Id.* at 63-65.

In *Kern*, Chief Judge Black again addressed whether the Court had subject-matter jurisdiction over a controversy involving foreign states and acts taking place in foreign countries. In that case air crashes took place in Nepal involving aircraft built by Airbus Industrie, a company which is majority owned by foreign sovereigns. The Court ruled that there was federal question jurisdiction in the case because the resolution of plaintiffs' state law claims depended on the interpretation of certain United States treaties. Alternatively, the Court held that there was also federal question jurisdiction because plaintiffs' claims raised questions of foreign relations which were incorporated into federal common law. "The fact that foreign countries [were] not specifically named in the lawsuit [was] immaterial." "Since the interests of foreign countries in the litigation are substantial," this Court

concluded, "there was federal question jurisdiction." *Kern*, 867 F. Supp. at 531-532.

As explained at length in the Note Verbale it is entirely clear, using Chief Judge Black's formulation of the standard in *Kern*, *supra*, that the interests of the Federal Republic of Germany in this litigation are substantial. It is equally clear, as the Supreme Court put it in *Radcliff Materials*, that this case presents an international dispute "implicating . . . our relations with foreign nations." *Id.* at 641.

The first substantial interest is Germany's interest in secure and reasonably priced energy supplies. Note Verbale, paras. 3-8. A state, 80% of whose natural gas is imported, must view the security of its gas supply as an important concern. The elaborate legal system fashioned by the producing and consuming European states to address this problem is testimony to its importance. Note Verbale, paras. 10-14.

Second, the Court can take judicial notice that this case presents delicate problems of foreign relations with the Kingdom of Norway. Because decisions of the case will call into question decisions of the Kingdom of Norway, made by its state-owned oil company, Statoil, and state-owned pipeline, Statpipe, within its territorial boundaries, the foreign relations problems that led to the creation of the act of state doctrine are implicated. *See, Sabbatino.*

Third, the issue whether Marathon may escape international arbitration takes on a different coloration when viewed as implicating the relations of the United States with foreign nations. It is well established that the mere

existence of an issue whether the New York Convention applies, does not confer federal question jurisdiction. *Prudential-Bache Securities, Inc. v. Fitch*, 966 F.2d 981, 989 (5th Cir. 1992). When viewed, however, as an issue in United States foreign relations with Europe, it is a candidate for the "substantial federal issue" required for subject-matter jurisdiction. Because as set out in the Note Verbale, it is the custom of European countries, in particular the Federal Republic of Germany and the Kingdom of Norway, to resolve issues concerning natural gas contracts via arbitration, interference by a United States court in this process does, we respectfully submit, raise a significant issue of foreign relations and as a result provides subject-matter jurisdiction in this case.

Because all of the foregoing issues of foreign relations appear on the face of the First Amended Petition and require the Court to resolve substantial issues of federal law, this Court has subject-matter jurisdiction.

B. The New York Convention requires that this dispute be submitted to arbitration.

The Federal Republic of Germany respectfully submits that this Court should grant Ruhrgas' motion for reconsideration of its order denying motion for stay pending arbitration. The Court denied Ruhrgas motion for stay on the ground that the plaintiffs themselves had not consented to arbitration and that they were not obligated to arbitrate as a result of their relationship with MPCN. November 17, 1995, Memorandum and Order, Instrument #38, pp. 4-11.

We respectfully submit, however, that the affidavits and correspondence submitted by Ruhrgas and the deposition testimony of plaintiffs' employees, John Alvins Evans and Burton Bossley,[2] support Ruhrgas' position that MPCN was controlled by the plaintiffs, Marathon Oil Company (MOC) and its subsidiary Marathon International Oil Company (MIOC). MOC and MIOC owned the stock of MPCN and controlled the negotiations leading to the agreement signed by MPCN to develop the Heimdal filed [sic] that included the arbitration clause. There is no indication in the record that MPCN had employees of its own. Such employees were not necessary because negotiations and supervision were performed by employees of the plaintiffs. Employees of MOC and MIOC stated in affidavits that they were members of the MOC team which conducted the negotiations and that they executed the agreements for the exploration of the Heimdal field on behalf of MPCN. Evans Deposition, pp. 6-8, 24-33; Bossley Deposition, pp. 15-33.

All decisions concerning the development of the gas fields were made by the parent corporation. Whenever a new area was to be explored, a geographical subsidiary would be set up, such as Marathon France, Marathon Germany, or, as in the instant case, Marathon Norway. The subsidiaries required few or no employees, because all of the work was done by employees of the plaintiffs who were then assigned to the respective subsidiary to perform such tasks as directed by the plaintiffs. Evans Deposition, pp. 24-33.

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[2] Exhibits 2 and 6 to Ruhrgas' Motion for Reconsideration.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court ruled that an agreement by the parties to arbitrate any dispute arising out of their international commercial transaction was to be enforced in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, in a case involving securities fraud. The Court did so although in *Wilko v. Swann*, 346 U.S. 346 (1953), it had refused to enforce the arbitration clause in another case involving securities fraud where the dispute was not international. In *United Steelworkers v. America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583, (1960), the Court said that arbitration must be compelled unless the court can say with "positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." In short, there is a "liberal federal policy favoring arbitration agreements," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), especially in cases involving international commerce.

The New York Convention, *supra*, states in pertinent part that "[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . . " 9 U.S.C. § 3. The United States statute that puts the New York Convention into effect provides that "[w]here the

subject matter of an action or proceeding pending in a State court *relates* to an arbitration agreement or award falling under the Convention, the defendant . . . may . . . remove such action or proceeding" to federal court. 9 U.S.C. § 205, emphasis supplied.

We ask the Court to note at this point that the only alleged misrepresentation by Ruhrgas that is explicitly set out in the petition is the representation embodied in the agreement that Ruhrgas would pay for Heimdal gas based on a formula then yielding $6.16 mcf. First Amended Petition, ¶ 21. The alleged breach of that agreement has already been a subject of arbitration. ¶ 24-29. Though phrased in tort rather than breach of contract terms, the injury alleged in this case is economically the same injury that was the subject of the arbitration described in the petition. Marathon and its affiliates claims that they advanced money to develop the Heimdal field on the representation, embodied in the agreement, that they would be compensated by the $6.16 formula. The measure of damages, whether the cause of action is expressed as a tort or a breach of contract, can only be the difference between what the agreement promised Marathon and what Marathon has received or will receive. This precise issue has already been decided by arbitration. First Amended Petition, ¶ 26. It follows that the cause of action set out in the petition "relates," as 9 U.S.C. § 205 states, to the arbitration. It relates because the underlying injury is identical.

The issue presented is best characterized not as whether plaintiffs have agreed to submit any claim against Ruhrgas to arbitration, but whether under the circumstances of this case, the plaintiffs as affiliates of

MPCN are bound by the arbitration clause agreed to by MPCN.

As Ruhrgas has accurately pointed out to the Court:

> The coverage of the arbitration clause set out in Article 15 of the Agreement is very broad, covering "[a]ll claims, disputes, and other matters arising out of or relating to this Agreement. . . . " The Fifth Circuit has stated that when the parties agree to such a broad clause, "they intend their clause to reach all aspects of the relationship." *Valentine Sugar Inc. v. Donau Corp.*, 981 F.2d 210, 213 n.2 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 3039 (1993). Such a broad clause covers not only contract claims, but tort claims which "arise out of the business relationship between the opposing parties." *Snap-On tools Corp. v. Mason*, 18 F.3d 1262, 1265 (5th Cir. 1994).

Ruhrgas Memorandum in Support of Motion for Stay Pending Arbitration, p. 6. There can be no doubt that the issues placed in dispute by the plaintiffs in this case arise out of the same business relationship as the issue of the price to be paid for gas from the Heimdal field that has already been the subject of arbitration between MPCN and the Consortium. This Court has so ruled. Memorandum and Order entered November 17, 1995, Instrument #38, p. 4, n.3.

Marathon's response to this argument is that only its affiliate, MPCN, not Marathon Oil or any of the other named plaintiffs, signed the agreement with the arbitration clause. Marathon's Response to Ruhrgas' Motion to Stay Arbitration, pp. 3-12. However, as Ruhrgas replied, Ruhrgas Motion for Reconsideration, pp. 6-14, citing *Dow Chemical v. Isover Saint Gobain*, Cour d'Appel, Paris, 21

October 1983, 110 J.899 (1983) IX Yearbook 131 (1984), a precedent under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC") in Paris, where a parent company has exercised control over a subsidiary having signed the relevant contract or participated in its negotiation, performance, and/or termination, the whole group of companies is bound by the arbitration clause in the agreement. *Dow Chemical* is one of a line of awards rendered by arbitral tribunals acting under the auspices of the ICC that have come to this conclusion. *See* ICC matter No. 1434, award of 1975, 103 J. du Droit Int'l 978-980 (1976); ICC matter no. 2375, award of 1975, 103 J. du Droit Int'l 973-974 (1976); *see also* ICC matter no. 3493, award of March 11, 1983, 22 I.L.M. 752, 761-67 (1983); ICC matter no. 5103, award of 1988, 115 J. du Droit Int'l 1206 (1988); ICC matter no. 5730, award of 1988, 117 J. du Droit Int'l 1029 (1990); ICC matter no. 6519, award of 1991, 118 J. du Droit Int'l 1065 (1991). Precedent from arbitration under the auspices of the ICC should be given great weight in this case because the arbitration clause in issue specifies that arbitration will be governed by the ICC rules. As a consequence, pursuant to the arbitration clause in Article 15 of the agreement between Ruhrgas and MPCN, the issues presented by the instant case are also required to be submitted for arbitration.

C. This Court should dismiss on the ground of *forum non conveniens* in favor of a European forum.

Germany has little to add to the argument made by Ruhrgas in its motion to dismiss on the ground of *forum*

non conveniens, except to say that there clearly are adequate and more convenient forums in Europe, and since Marathon's affiliate has agreed to ICC arbitration in Sweden, and Sweden is a neutral forum as among United States, German, and Norwegian litigants, arbitration in Sweden may be the most favored location to resolve this dispute.

D. Alternatively, the Court should dismiss for lack of personal jurisdiction.

Germany also has little to add to the arguments made by Ruhrgas in its motion to dismiss for lack of personal jurisdiction. Germany supports that motion. Germany suggests in addition only that the lack of contacts between Ruhrgas and the United States would also support dismissal on the ground of *forum non conveniens* to allow resolution of this dispute in a European forum, whether arbitral or national.

CONCLUSION

For the foregoing reasons, the motion to remand should be denied. The case should then be stayed pending arbitration or dismissed on the ground of *forum non conveniens* or for lack of personal jurisdiction.

Respectfully submitted,

/S/

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January 19, 1996

APPENDIX H

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to

submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the county where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the

appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of all other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United

Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958: entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

APPENDIX I

Interim Award of September 23, 1982 in No. 4131 (ORIGINAL IN FRENCH)

Arbitrators: Prof. Pieter Sanders (Pres.), Prof. Berthold Goldman
Prof. Michel Vasseur

Parties: Claimants: 1. Dow Chemical France (France)

2. The Dow Chemical Company (USA)

3. Dow Chemical A.G. (Swiss)

4. Dow Chemical Europe (Swiss)

Defendant: ISOVER SAINT GOBAIN (France)

Published in: 110 *Journal du droit international (Clunet)* 1983, pp. 899-905, with note Y. Derains, pp. 905-907.

Subject matters:

- group of companies
- is arbitration clause in a contract binding upon other companies of the group which did not sign the contract but participated in its formation, performance and termination?
- competence of arbitrators to decide upon their jurisdiction
- law applicable to the arbitration agreement

Note General Editor

This interim award was the subject of an action for setting aside (*recours en annulation*) under Article 1502 of the French CCP instituted by the Defendant. The *Court of Appeal in Paris* rejected the plea of lack of jurisdiction of the arbitrators by its judgment of October 21, 1983. The Court considered *inter alia*:

> "The arbitrators for good reasons have observed that the law applicable to determine the scope and effects of an arbitral clause providing for international arbitration does not necessarily coincide with the law applicable to the merits of the dispute" (see Extract of Award under I).
>
> "Following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators have, for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well;
>
> "The arbitrators have also, subsidiarily, referred to the notice of 'group of companies', the existence of which according to the customs of the international trade has not been seriously contested by the defendant;
>
> "The arbitrators thus have justified their competence and the objection that they have decided in the absence of an arbitration agreement is, therefore, like the previous one (not reported here) without foundation."

FACTS

In 1965, DOW CHEMICAL (Venezuela) entered into a contract with the French Company Boussois-Isolation, whose rights and obligations were subsequently assigned to ISOVER SAINT GOBAIN, for the distribution in France of thermal isolation equipment. DOW CHEMICAL (Venezuela) itself subsequently assigned the contract to DOW CHEMICAL A.G. (Claimant no. 3), a subsidiary of DOW CHEMICAL COMPANY (Claimant no. 1).

In 1968, a second distribution agreement was entered into by DOW CHEMICAL EUROPE (Claimant no. 4), a subsidiary of DOW CHEMICAL A.G., with three other companies (including Boussois-Isolation) whose rights and obligations were later assigned to ISOVER SAINT GOBAIN (Defendant) for the distribution of essentially the same products in France.

Both the 1965 and the 1968 agreements, which contained ICC arbitration clauses, provided that deliveries could be made by DOW CHEMICAL FRANCE or any other subsidiary of the DOW CHEMICAL COMPANY. DOW CHEMICAL FRANCE did in fact effectuate the deliveries contemplated in the contracts.

Several actions (not described in the interim award) were brought before French courts against companies of the DOW CHEMICAL Group relating to difficulties in connection with one of the products ("Roofmate").

On the basis of the arbitration clause contained in the contracts with DOW CHEMICAL A.G. and DOW CHEMICAL EUROPE (Claimants no. 3 and 4) the Claimants instituted arbitral proceedings against Defendant alleging

that Defendant alone was liable for damages resulting from the use of Roofmate in France.

Defendant raised two preliminary objections, formulated as follows in the Terms of Reference signed by the parties.

(1) Does the arbitral tribunal have competence to render an award between DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY on the one hand and ISOVER SAINT GOBAIN on the other?

(2) In case the arbitral tribunal has no jurisdiction in respect of DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY (the first two Claimants), should it then not reject the claim of DOW CHEMICAL A.G. and DOW CHEMICAL EUROPE (the Claimants under 3 and 4) for reasons of lack of direct interest in the cause of action? (In French: à raison de ce qu'elles invoquent un préjudice qui ne serait qu'éventuel?)

It was decided at a preparatory hearing that the arbitral tribunal would first of all render an interim award on these two questions.

EXTRACT

"I. *On the Sources of Law That Should Apply*

"Considering that it is not disputed that the arbitration clauses relied upon by the claimants are contained in contracts that have been signed by neither DOW CHEMICAL (France) nor DOW CHEMICAL (USA); that these two companies, nonetheless, maintain that they may invoke them, by reason both of the factual context of the conclusion and performance of the contracts and of the fact that these companies, along with the signatories of the contracts, are part of

a group of which DOW CHEMICAL (USA) is the parent company, the three others being its daughter and granddaughters, entirely controlled by the former;

"Considering, thus, that the jurisdictional objection (*l'exception d'incompétence*), and, in consequence, the related objection as to the admissibility of the action (*exception d'irrecevabilité*) give rise to the issue of the scope and effects of the relevant arbitration clauses. Therefore, the sources of law appropriate to the determination of said scope and said effects should be defined;

"Considering that the Defendant, in fact, has argued that the arbitration clause contained in the 1968 contract, according to which 'any difference arising under this agreement will be settled . . . , according to French law . . . ' should be interpreted to mean not only that the merits of the dispute should be determined by reference to French law but also the scope and the effects of the arbitration agreement;

"Considering, however, that in referring to the ICC Rules, the parties incorporated its provisions concerning the arbitral tribunal's authority to decide as to its own jurisdiction, which provisions do not refer to the application of any national law. The reference to French law could therefore concern only the merits of the dispute;

"Considering that the sources of law applicable to determine the scope and the effects of an arbitration clause providing for international arbitration do not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy, is

governed – not only as to its scope, but also as to its effects – by its own specific sources of law, distinct from those that govern the merits of the dispute;

"Considering that this is particularly the case – unless the parties have expressly agreed otherwise – with respect to an arbitration clause referring to the ICC Rules.

"Considering in effect that these Rules, in their 1975 version (whose applicability to this case, given the dates of the litigious contracts, will be decided in due course), contain provisions relating to the proper law to be applied to the merits of the dispute (Article 13(3)), but are silent on this subject in their prior version. However, both versions of the Rules contain practically identical provisions (1955 Rules, Article 13; 1975 Rules, 'Arbitration' section, Article 8) concerning the arbitrator's competence to decide on his own jurisdiction. These provisions establish in particular, the principle of the complete autonomy of the arbitration clause (paragraph 4 of both texts) and confer on the arbitrator the power to take any decision as to his own jurisdiction upon the Court's determination that the arbitration will take place (paragraph 3) without obliging him to apply any national law whatever in order to do so.

"Considering that the tribunal shall, accordingly, determine the scope and effects of the arbitration clauses in question, and thereby reach its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterize the performance and later the termination of the contracts in which they appear. In doing so, the tribunal, following, in particular, French caselaw relating to international arbitration should also take into account, usages

conforming to the needs of international commerce, in particular, in the presence of a group of companies;

"Considering that in conformity with the 'General rule' set forth in Article 31 (1955 version) and Article 26 of the 'Arbitration' Section of the ICC Rules, the tribunal will however make every effort to make sure that the award is enforceable at law. To this end, it will assure itself that the solution it adopts is compatible with international public policy, in particular, in France.

"II. *On the Objection to Jurisdiction*

"Considering that in conformity with the preceding it is appropriate, in order to determine the scope and the effects of the arbitration clauses relied upon, to examine in succession the circumstances under which the negotiation, the performance and the termination of the contracts in which these claims appear, took place and to explore thereafter the possible bearing, in this context, of the fact that the claimants are part of a group of companies."

After a detailed analysis of the contract negotiations, the Tribunal continued by considering:

"*A. The negotiation of the contracts*

. . . .

"Considering that in point of fact DOW CHEMICAL FRANCE at the time of signature of the 1965 contract as well as the negotiations which led to the 1968 contract, appeared to be at the center of the organization of the contractual relationship with the companies succeeded by the present Defendant. Moreover, this relationship could not have been formed without the approval of the American parent

company, which owned the trademarks under which the relevant products were to be marketed in France;

"That this analysis reveals that neither the 'Sellers' nor the 'Distributors' attached the slightest importance to the choice of the company within the DOW Group that would sign the contracts. It is significant to note that none of the documents produced contains any trace of a discussion on this subject. In reality all the entities of the DOW Group involved in distribution in France understood themselves to be contracting with the distributor or distributors in France and likewise, it was with the aggregate of these entities that the present defendant's predecessors understood themselves to be contracting.

"*B. The Performance of the Contracts*

"Considering that – as it has been mentioned above – the distribution agreement of 1965 as well as the one of 1968 designated first of all DOW FRANCE for delivery of the products to distributor. Although it has been provided for that deliveries could also be effectuated, at the choice of the 'seller', by other subsidiaries of DOW CHEMICAL COMPANY, it is to be noted that, in fact, it has not been sustained that this option has ever been used. It has always been DOW FRANCE which has assured the execution of the contracts;

. . . .

"DOW FRANCE, therefore, played in the execution of the contracts an equally preponderant role as it did in the establishment of the contractual relations.

"Considering, moreover, that for exercising its contractual activities the distributor necessarily needed to make use of the trademarks belonging to the parent company, DOW CHEMICAL COMPANY, although no special license agreement appears to

have been concluded. This situation shows the primary involvement of the parent company in the distribution agreements;

"The same significance can be attached to the clause which has already been mentioned and according to which deliveries could be made by any wholly owned subsidiary of DOW (USA). The clause shows in fact that the parent company was the pivot of the contractual relationship finally established between certain entities of its group and the distributors."

After an analysis of letters leading up to the termination of the distribution agreement of 1968 the tribunal considered

"C. *The Termination of the Contracts*

. . . .

"That it thus appears, as was the case with respect to the conclusion and performance of the distribution agreements, that DOW CHEMICAL FRANCE played an essential role in the termination of the 1968 contract, which had been substituted for the 1965 contract; that all of these factors permit the conclusion that DOW CHEMICAL FRANCE was a party to each of these contracts and, consequently, to the arbitration clauses they contained;

"That the same conclusion should be reached with respect to DOW CHEMICAL COMPANY (USA) by reason of its ownership of the trademarks under which the products were marketed, and its absolute control over those of its subsidiaries that were directly involved, or could under the contracts have become involved in the conclusion, performance, or termination of the litigious distribution agreements.

"Considering that the Defendant adopted the same position in its brief of 1 July 1980 before the Court of

Appeal of Paris, in support of its motion for the compulsory joinder of *inter alia* DOW CHEMICAL COMPANY (USA)

"That the Defendant there in fact wrote as follows:

> 'Whereas DOW CHEMICAL COMPANY, owner of the patents and organizer of the manufacturing and distribution of Roofmate, decided and conceived the modalities of the manufacturing and distribution of said product, thus engaging its direct liability.' (Translated from French – Gen. Ed.)

"Considering that in the circumstances of this case, the application of the arbitration clauses to DOW CHEMICAL COMPANY (USA) may also be justified, as we shall now show, by the fact that the contracts containing these clauses concern, in the context of a group of companies, a parent company and certain of its subsidiaries. The same fact could justify, if necessary, the application of the arbitration clause to DOW CHEMICAL FRANCE.

"*D. The Group of Companies*

"Considering that it is indisputable – and in fact not disputed – that DOW CHEMICAL COMPANY (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like DOW CHEMICAL FRANCE, effectively and individually participated in their conclusion, their performance, and their termination;

"Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une réalité économique unique*) of which the arbitral tribunal should take account when it rules on its own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules.

"Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts *or* to have been principally concerned by them and the disputes to which they may give rise.

"Considering that ICC arbitral tribunals have already pronounced themselves to this effect (see the awards in Case N°. 2375 of 1975, *Journal du droit international* 1976.973; and in Case N°. 1434 of 1975, *id.* at 978). The decisions of these tribunals progressively create case-law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.

"Considering that it is true that in another award (Case N°. 2138 of 1974, *Journal du droit international* 1975.934) the arbitral tribunal refused to extend an arbitration clause signed by one company to another company of the same group. However, in so doing it based itself on the factor 'that it was not established that Company X' (which the tribunal had determined was neither a signatory nor a party to the contract) 'would have accepted the arbitration clause if it had signed the contract directly.'

"Considering that in the absence of such a showing, the tribunal did not allow application of the arbitration clause; but that in the present case, the circumstances and the documents analyzed above show that such application conforms to the mutual intent of the parties.

"That it is not without interest to recall that an American arbitral tribunal recently reached a similar result, referring to U.S. national court decisions and observing that 'it is neither sensible nor practical to exclude (from the arbitral jurisdiction) the claims of companies who have an interest in the venture and who are members of the same corporate family.' (Society of Maritime Arbitrators, Inc., New York, Partial Final Award N°. 1510, 28 November 1980,VII *Yearbook Commercial Arbitration*, American Awards, p. 151 (1982).)

"Considering finally that in a matter directly connected with the issues litigated in the present arbitration, the Court of Appeal of Paris on 5 February 1982 held that it lacked jurisdiction to hear ISOVER SAINT GOBAIN's motion for the compulsory joinder of not only DOW CHEMICAL EUROPE (which signed the 1968 distribution contract), but also DOW CHEMICAL COMPANY (USA) and '(referred) ISOVER SAINT GOBAIN to the proper jurisdiction of the arbitral tribunal of the ICC in Paris.' In order to justify this decision, the Court of Appeal stated 'that ISOVER SAINT GOBAIN cannot dispute the fact that the litigation is pending and that its claims against DOW COMPANY and DOW EUROPE in their relations *inter se* flow directly from the two contracts (of 1965 and 1968);

"It is true that by the same decision the Court reached a decision on the merits as regards DOW CHEMICAL FRANCE. However, in that case, the said company had been sued on the grounds of quasi-tortious liability, and did not invoke the arbitration clauses and did not contest jurisdiction.

"In conclusion it is appropriate for the tribunal to assume jurisdiction over the claim brought not only

by DOW CHEMICAL AG (Zürich) and DOW CHEMICAL EUROPE, but also by DOW CHEMICAL COMPANY (USA) and DOW CHEMICAL FRANCE.

"In so doing, the tribunal contradicts no principle nor any rule of international 'public policy' in particular, that of the French legal system. The latter is not based on any principle, nor does it contain any rule of such a stature, that would prohibit giving to an arbitration clause implicating companies that are legally distinct but form part of a group of companies, the scope attributed to it by the present award. To the contrary, by taking into account, in reaching this result, the needs of international commerce to which the rules of international arbitration should be responsive, the tribunal follows the example of French caselaw to which express reference was made in the report to the Prime Minister explaining the purposes of the Decree of May 12, 1981.[1]

"III *On the Admissibility of the Action* (Exception d'irrecevabilité)

"Considering that, as has been recalled, the alleged non-admissibility of the claims of DOW CHEMICAL AG and DOW CHEMICAL EUROPE invoked by the Defendant is connected by the arbitrators' Terms of Reference, to the decision sought from the tribunal on its jurisdiction with respect to the two other Claimants;

"Considering that the tribunal will reject the challenge to its jurisdiction, it will as a result, not at present uphold the challenge to the admissibility of

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[1] See W. L. Craig, W. W. Park, and J. Paulsson, "French Codification of a Legal Framework for International Commercial Arbitration: The Decree of May 12, 1981", in *Yearbook Commercial Arbitration* Vol. Vll (1982) at p. 412.

the action. This decision will not, however, preclude a future ruling by the tribunal on the existence or the absence of interest to institute an action as far as one or both of the Claimants in question, are concerned or a possible finding that the claims of one or both of them may not be heard due to an absence of direct interest in the cause of action."

"FOR THESE REASONS, the Tribunal

"1. Assumes jurisdiction to decide the claims of the four Claimants.

"2. Rejects, for the present, the Defendant's challenge to the admissibility of the action of DOW CHEMICAL AG (Zürich) and DOW CHEMICAL EUROPE.

"3. Reserves the question of costs."

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARATHON OIL COMPANY, MARATHON INTERNATIONAL OIL COMPANY, AND MARATHON PETROLEUM NORGE A/S Plaintiffs, v. RUHRGAS, A.G. Defendant.	§ § § § § § § § § § §	CIVIL ACTION NO. H-95-4176

AFFIDAVIT OF JOHN A. EVANS

THE STATE OF OHIO §
§
HANCOCK COUNTY §

BEFORE ME, the undersigned authority, on this day personally appeared John A. Evans who is personally known to me, and first being sworn according to law upon his oath, deposed and said:

1. My name is John A. Evans. I reside in Findlay, Hancock County, Ohio. I am over 18 years of age, have never been convicted of a crime, and I am fully competent to make this Affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

2. I am the corporate Secretary of Marathon International Oil Company ("MIOC"). I am generally familiar

with the relationship between MIOC and its affiliates, including Marathon Petroleum Norge A/S ("Norge") and Marathon Petroleum Company (Norway) ("MPCN"). I am also familiar with the structure of MIOC's financing of the operations of the Heimdal gas filed [sic].

3. Since the late 1970s, MPCN's operations in the Heimdal field have been funded by MIOC. MIOC obtained those funds from its parent, Marathon Oil Company ("MOC"). MIOC loaned over $100 million to MPC(N) in the early 1980s pursuant to a Loan Agreement. MPCN then used the funds for its Heimdal field operations and development.

4. In August 1984 the Loan Agreement was assigned to a wholly owned subsidiary of MIOC named Marathon International Oil Finance Company ("MIOFCO"). On December 30, 1986 that loan was assigned by MIOFCO back to MIOC.

5. The loan from MIOC to MPCN was increased to over $415,000,000 in 1988.

6. In 1989 the Loan Agreement between MIOC and MPCN was assigned by MIOC to a new wholly owned subsidiary of MIOC named Marathon Petroleum Caymans, Ltd. At the time, the loan outstanding had increased to over $440 million. The name of that subsidiary has subsequently been changed to Marathon Petroleum Investment, Ltd. ("MPI").

7. MPI did not assume the risk of non-payment of the Loan Agreement with MPCN. Rather repayment of that loan was specifically guaranteed by MIOC to MPI. Subsequently, when the Loan Agreement was amended in

1992, MIOC was again required to guarantee the repayment of the amended loan, leaving financial liability for the loan on MIOC.

8. The relationships and guarantees between the parties are structured to achieve the following results. If MPCN repays the note to MPI, MPI then will be able to repay MIOC through dividends, and MIOC would be able to repay MOC in the same way. On the other hand, if MPCN is unable to repay the loan, MIOC would be forced to honor its guaranty to MPI, thereby sustaining the full loss. In that event, MIOC would be unable to make corresponding payments to MOC.

9. It now appears unlikely that MPCN ever can repay its note. Accordingly, MIOC will be forced to satisfy the default, suffering the ultimate consequences.

This is Affiant's complete statement.

/s/ _____

SUBSCRIBED AND SWORN TO BEFORE ME on January 8, 1996.

/s/ _____
NOTARY PUBLIC, In and For
The State of Ohio [seal]

[Notary Stamp of Joyce A. Tellez]